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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

MYRON AND DOROTHY MILES,

Petitioners,

vs.

EDWARD MADIGAN, Secretary of Agriculture;
THE UNITED STATES DEPARTMENT OF AGRICULTURE;
LA VERNE G. AUSMAN, Administrator of
The Farmers Home Administration; and
THE FARMERS HOME ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY*
TODD S. WELCH
JOHN G. NELSON
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

*Counsel of Record

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

Whether it is arbitrary and capricious for a federal agency, in the designation of "wetlands," to fail to utilize the federal manual which federal rules mandate must be used to designate "wetlands"?

Whether a private citizen may maintain a lawsuit against the U.S. Government for breach of contract regarding private property when the U.S. Government fails to provided notice – as required by federal regulations – of the ability of the U.S. Government to encumber such private property by the imposition of a "wetlands" easement?

Whether the remedy for a private citizen, injured by the failure of the U.S. Government to abide by its own regulations, is the rescission of the offending agency action?

LIST OF PARTIES

Myron and Dorothy Miles were Plaintiffs in the United States District Court for the District of Oregon and Appellants in the United States Court of Appeals for the Ninth District.

The following were Defendants in the United States District Court for the District of Oregon and Appellees in the United States Court of Appeals for the Ninth District: Clayton Yeutter, in his official capacity as Secretary of Agriculture (Mr. Yeutter has been replaced in that capacity by Edward Madigan); the United States Department of Agriculture; Neil Sox Johnson, in his official capacity as Administrator of the Farmers Home Administration (Mr. Johnson has been replaced in that capacity by La Verne G. Ausman); and the Farmers Home Administration.

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OPINIONS BELOW

Review is sought of the unreported opinion of the Ninth Circuit Court of Appeals dated February 28, 1992, appearing at pages App. 40 to App. 47 of the Appendix. The unreported opinions and accompanying orders of the District Court are dated July 3, 1990, and October 11, 1991, and appear at pages App. 1 to App. 33 of the Appendix and pages App. 34 to App. 39 of the Appendix, respectively.

JURISDICTION

Petitioners seek review of the opinion and judgment issued by the Ninth Circuit Court of Appeals on February 28, 1992. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution is at issue in this Petition for *Writ of Certiorari*.

STATUTES INVOLVED

The Food Security Act, 7 U.S.C. §1985, requires the Secretary of Agriculture, acting through the Farmers Home Administration (FmHA), to offer lease-back/buy-back rights to former owners of FmHA inventory property.

The Administrative Procedure Act, 5 U.S.C. §706 (2)(A), requires the courts to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

STATEMENT OF THE CASE

Petitioners Myron E. and Dorothy L. Miles are the previous owners and current lessees of a 1043-acre cattle ranch located in Baker County, Oregon.

In March 1985, the Miles, like farmers all across the country, fell upon hard times. The Miles discussed their financial difficulties with Mr. Billy Clonts, the FmHA County Supervisor, who suggested that the Miles deed their property to the FmHA to satisfy two mortgages held by the FmHA in exchange for which the Miles would retain a lease-back/buy-back option.

Although the Miles had alternative sources of financing, they agreed to the solution suggested by Mr. Clonts. Had the Miles not been assured by the FmHA that they would be able to repurchase the entire property in an unencumbered state, they would have obtained alternative financing.

On November 22, 1985, the Miles executed a Deed in Satisfaction of Mortgage transferring the property to the FmHA. Pursuant to the lease-back portion of the Miles' option agreement with the FmHA, the Miles remained on the property and continued their ranching operation.

On December 23, 1985, Congress passed the Food Security Act, 7 U.S.C. §1961 *et. seq*. The Food Security Act required FmHA to offer lease-back/buy-back rights to former owners of the inventory property held by the FmHA. *Id*. at §1985.

On March 13, 1987, the Miles executed a formal lease of their property. The lease contained no language whatsoever regarding the ability of the FmHA, or any other

agency of the U.S. Government, to impose a "wetlands" easement upon the property.[1]

On February 25, 1988, the U.S. Fish and Wildlife Service (FWS) informed the FmHA of the existence of an alleged wetlands "complex" on the Miles ranch.[2] In a

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[1] Executive Order 11990 of 1977, the Food Security Act and FmHA regulations promulgated pursuant to them preceded the contract between the Miles and the U.S. Government. Executive Order 11990 provides:

> When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, or right-of-way or disposal to non-Federal public or private parties, the Federal agency *shall* (a) *reference in the conveyance* those uses that are restricted under identified Federal, State or local wetlands regulations; *and* (b) *attach other appropriate restrictions* to the uses of the properties by the grantee or purchaser and any successor, except where prohibited by law; *or* (c) *withhold such properties* from disposal. (Emphasis added).

FmHA regulations provide:

> The County Supervisor or District Director *will inform prospective purchasers* at the *time of the first inquiry* and in any notice of public sale that the property is located in a special flood, mudslide hazard or wetland area and specify any use restrictions resulting from this location. The County Supervisor or District Director *will* also *prepare and deliver a written notice* to the prospective purchaser at the time the bid or offer to purchase is signed by the purchaser.

7 C.F.R. §1955.137(a)(2)(i). (Emphasis added.)

[2] The Fish and Wildlife Service made this recommendation pursuant to a memorandum of understanding between the

(Continued on following page)

letter dated May 27, 1988, the FWS recommended that the entire ranch either be transferred to the control of the FWS or be subjected to a conservation easement.

The FWS proposal was not acceptable to the FmHA. As a result, on the afternoon of August 23, 1988, the Miles' ranch was inspected for the presence of "wetlands." After this visit, U.S. Government officials reduced their estimate of the ranch's "wetlands" to 609 acres, a reduction of over 400 acres or 41.6 percent of the ranch's acreage.

On January 10, 1989, the four federal agencies most involved with "wetlands," including the United States Department of Agriculture Soil Conservation Service, adopted a "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (the "Federal Manual").[3] The Federal Manual sets forth the technical basis for identifying and delineating wetlands in the United States. The Federal Manual was the product of months of discussions and represented the cumulative, scientific expertise of the four agencies in identifying "wetlands." The Federal

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FWS and the FmHA, under which the FWS was to assist in the designation of "wetlands" on the inventory property of the FmHA.

[3] The agencies which adopted the Federal Manual were the U. S. Department of Agriculture Soil Conservation Service, the Fish and Wildlife Service, the Environmental Protection Agency, and the U.S. Army Corps of Engineers.

Manual provides a thorough, scientifically defensible basis for "wetlands" identification.[4]

On April 20, 1989, more than three months after the adoption of the Federal Manual, U.S. Government officials again returned to the Miles' ranch to finalize the process of delineating "wetlands" and establishing the easement boundaries.[5] Notwithstanding the existence of the Federal Manual and its mandatory requirement that it be utilized in designating wetlands, the federal officials made no attempt to apply the Federal Manual to the Miles' ranch. Instead, operating under what the District

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[4] The Federal Manual specifically provides:

> 1.0 The purpose of this manual is to provide users with *mandatory technical criteria*, field indicators and other sources of information, and recommended methods to determine whether an area is a jurisdictional wetland or not, and to delineate the upper boundary of these wetlands. . . . This manual, therefore, provides a *single, consistent approach for identifying and delineating wetlands* from a multiagency Federal perspective.
>
> * * *
>
> 1.2 The manual should be used for identification and delineation of wetlands in the United States. . . . The technical criteria for wetland identification presented in Part II are *mandatory*. . . .

Federal Interagency Committee for Wetland Delineation. 1989. Federal Manual for Identifying and Delineating Jurisdictional Wetlands. U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and U.S.D.A. Soil Conservation Service, Washington, D.C. Cooperative technical publication (Federal Manual), at page 1. (Emphasis added).

[5] Agencies represented included the FmHA, the U.S.D.A. Soil Conservation Service, and the U.S. Fish and Wildlife Service.

Court characterized as a process of "consensus," (App. at 29) the federal officials declared that 609 acres were "wetlands" and decided that those lands would be placed off limits under an environmental easement.

This "wetlands" easement encumbers more than 58 per cent (609 out of 1043 acres) of the Miles' ranch. The easement required the erection of a fence separating the easement area from the rest of the property so as to prevent the presence of cattle upon the easement.[6]

The Miles sought a hearing before the FmHA in order to present evidence challenging the correctness of the wetlands designation. That request for an administrative hearing was denied by the FmHA. To protect the economic viability of their property as a cattle ranch, the Miles filed suit against the U.S. Government.

PROCEEDINGS IN THIS CASE

The Miles' complaint alleged sixteen claims for relief which were listed by the District Court in its Memorandum. (App. at 6-7.)

Federal Defendants filed a Motion to Dismiss or for Summary Judgment on all of the Miles' claims for relief. Without ruling on the motions filed by the Federal Defendants, the District Court, set a date for trial and

[6] The existence of the wetlands easement – occupying the center 58 percent of the Miles' ranch – leaves the Miles with only the corners and edges of their property, making it nearly impossible for the Miles to move their cattle from one portion of their property to another.

ordered that the parties present their cases-in-chief in the form of witness affidavits and that witnesses be cross examined at trial. On April 23, 1990, the parties appeared, prepared to present their cases pursuant to the District Court's order.

However, at that time, the District Court declared that there was no time for cross examination to occur in open court and that any cross examination would be conducted by means of depositions. At the same time, the District Court announced that it had reached a decision on portions of the Federal Defendants' Motion to Dismiss or for Summary Judgment. The District Court ruled, from the bench, that certain of the Miles' claims had been dismissed, that the remaining claims arose under the Administrative Procedure Act (APA), and that those claims would be addressed later.

When the hearing resumed later that same day, the District Court ruled that the remaining claims would be addressed based solely upon the administrative record and that there would be no opportunity to supplement that record. The Miles objected, arguing that they should have an opportunity to present evidence – including the testimony of an expert the Miles had retained – regarding whether or not the designation of the wetlands was arbitrary and capricious. These requests and arguments were rejected. The District Court announced that it was taking the matter under advisement and adjourned the hearing. (App. at 49-64)

On July 3, 1990, the District Court issued its decision and orders, setting forth its Findings of Fact and

Conclusions of Law. (App. at 19-30.). The District Court ruled against the Miles on all issues, specifically:

– that the action of the U.S. Government in designating wetlands upon the Miles' ranch was not arbitrary and capricious, notwithstanding the failure of the U.S. Government to utilize the Federal Manual in designating "wetlands;" (App. at 29)

– that the Miles could not maintain an action against the U.S. Government for its failure to provide the Miles notice – as required by federal regulations – of the ability of the U.S. Government to impose a wetlands easement upon the Miles' land; (App. at 14)

– that the only remedy available to the Miles for the failure of the U.S. Government to comply with federal regulations requiring notice was the rescission of the lease-back/buy-back agreement, and not the rescission of the wetlands easement adopted by the U.S. Government. (App. at 14-15)

A timely appeal was filed with the Ninth Circuit Court of Appeals and was scheduled for oral argument on July 10, 1991. (App. at 42).

Prior to the oral arguments before the Ninth Circuit Court of Appeals, the Miles sought a continuance to file for relief from the judgment based upon newly discovered evidence relating to the designation of the wetlands. The appeal was continued pending a ruling from the District Court on the motion of the Miles pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure.

The Miles filed for Relief from Judgment when the Soil Conservation Service, one of the "expert agencies"

which designated the original wetlands on the Miles property, revisited the Miles' ranch at the request of the Miles and, using the procedures required by the Federal Manual, determined that only 15% to 20% of the property was "wetlands," rather than the 58% originally designated by the U.S. Government.

The Miles sought to introduce this evidence to the District Court because, in its ruling, the District Court held that the Miles "have not identified any differences in the easement boundaries which would appear if the boundaries were redetermined using the Federal Manual" and, further, "have failed to show that the method used to delineate the wetlands easement was deficient in any way." (App. at 29.)[7]

The Motion for Relief from Judgment was denied by the District Court which held that "Plaintiffs (Miles) have not explained why they could not have commissioned their own study before trial." (App. at 39.) As noted above, the District Court reached this conclusion despite its original ruling that the Miles would not be permitted to supplement the record.

An appeal from the decision denying Relief from Judgment was filed in a timely manner and the two appeals were consolidated. (App. at 42.) The case was decided by the Ninth Circuit Court of Appeals on the briefs without oral argument. The Ninth Circuit Court of

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[7] The District Court holding regarding such evidence is ironic since the District Court did not permit the Miles to present any evidence regarding the wetlands designation, ordering instead that the matter would be reviewed only on the basis of the administrative record. (App. at 63-66, 70.)

Appeals affirmed the District Court in all respects. (App. at 42.)

This Petition for *Writ* of *Certiorari* follows the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit Court Of Appeals Holding That The Failure Of A Federal Agency To Apply Its Own Regulations Is Not Arbitrary And Capricious Merits Review By This Court.

A. The Decision Of The Ninth Circuit Court Of Appeals Panel Conflicts With The Holding Of This Court.

On numerous occasions, this Court has held that a federal agency's failure to adhere to its own regulations is arbitrary and capricious action which cannot be allowed to stand. *See, e. g., Yellin v. United States,* 374 U.S. 109 (1963) (contempt charges against witness who refused to testify before Congressional committee after the committee denied the witness' request to be heard in executive session reversed because committee violated its own rule requiring it to consider the effect a public interrogation might have on the witness' reputation); *Service v. Dulles,* 354 U.S. 363 (1957) (decision to discharge Foreign Service officer voided because procedural requirements contained in regulatory framework violated).

The Ninth Circuit Court of Appeals Panel held that the failure by the U.S. Government to apply the Federal

Manual adopted for the purpose of delineating "wetlands" was not arbitrary and capricious. App. at 46. This holding places the panel in direct and irreconcilable conflict with the decisions of this Court. As a result, the Petition should be granted. In the alternative, in view of the conflict with this Court's prior decisions, the Court may wish to consider summary reversal.

B. The Decision Of The Ninth Circuit Court Of Appeals Panel Is In Conflict With Prior Holdings Of The Ninth Circuit Court Of Appeals.

The Ninth Circuit Court of Appeals has held several times that an agency's failure to adhere to its own rules is the essence of arbitrary and capricious action. *California Trucking Ass'n v. I.C.C.*, 900 F.2d 208 (9th Cir. 1990) (federal agencies may not depart, *sub silentio*, from usual rules of decision); *Gray Lines Tour Co. of Southern Nevada v. I.C.C.*, 824 F.2d 811 (9th Cir. 1987) (agencies must comply with their own regulations); *Confederated Tribes and Bands of the Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1984) (agencies must comply with their own regulations).

Notwithstanding these prior holdings, the Ninth Circuit Court of Appeals Panel below held that the failure of the U.S. Government to adhere to its own regulations in the delineation of "wetlands" was not arbitrary and capricious. Such a holding places the panel in direct conflict with earlier holdings of the Ninth Circuit Court of Appeals. Therefore, this Court should grant *certiorari* in this case.

C. The Decision Of The Ninth Circuit Court Of Appeals Panel Conflicts With Numerous Holdings In Nearly Every Other Circuit.

Nearly every Circuit Court of Appeals has held that federal agencies must comply with their own rules and regulations. Furthermore, it matters not whether the regulation is published as long as it is a mandatory procedure. "[I]t is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies, whether or not published in the Federal Register, if they are intended as mandatory." *Lucas v. Hodges*, 730 F.2d 1493, 1504, n. 20, (D.C. Cir. 1984), *vacated on other grounds*, 738 F.2d 1392. *See* also *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977).

In the case at bar it is clear that the federal agencies regard the utilization of the Federal Manual as mandatory for the delineation of "wetlands." *See*, footnote 4, *supra*, where the language of the Federal Manual is quoted.

Typical of the holding that agencies must comply with their own rules and regulations is the opinion of the Tenth Circuit which states:

> While the [Interstate Commerce] Commission would have the power to adopt either of two different approaches to deciding these cases, it cannot adopt one and apply the other. *To do so is the essence of arbitrary and capricious action* . . . . [W]e surely must require the agency to adhere to its own pronouncements.

Squaw Transit Co. v. United States, 574 F.2d 492, 496 (10th Cir. 1978). (Emphasis added.)

Other Circuits have held similarly. *See, e. g., Center for Auto Safety v. Dole,* 828 F.2d 799 (D.C. Cir. 1987) (court must require agency to follow legal standards contained in its own regulations despite the fact that the statute has granted agency discretion in the matter); *Revak v. National Mines Corp.,* 808 F.2d 996 (3rd Cir. 1986) (notwithstanding court's usual deference to administrative agencies, court will require agency to abide by its own regulations until it rescinds them).

The Ninth Circuit Court of Appeals Panel held that the failure of the U.S. Government to adhere to its own regulations in the delineation of "wetlands" was not arbitrary and capricious. Such a holding places the panel in direct conflict with the holdings of numerous other circuit courts of appeals. Therefore, this Court should grant *certiorari* in this case.

D. The Decision Of The Ninth Circuit Court Of Appeals Panel Raises Important Constitutional Issues.

The rights of the Miles in property in which they held an interest have been adversely affected by the decision of the U.S. Government to designate 58% of that property as "wetlands." However, in so doing, the federal agencies failed to adhere to the Federal Manual which they adopted for the purpose of delineating "wetlands." As a result, the U.S. Government has run afoul of the Constitutional protections to which the Miles are entitled.

The Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

"The primary purpose of the Fifth Amendment's due process clause is to protect the individual citizen from the arbitrary exercise of power by the government." *Brown v. McGarr*, 583 F. Supp. 734, 736, (D.C. Ill. 1984), *citing Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) and *Application of Gault*, 387 U.S. 1, 20 (1967).

There is little question but that the Miles possessed an interest in property. The Miles transferred their property to the FmHA while retaining a lease-back/buy-back option. In addition, the contract into which the Miles entered with the U.S. Government sought to assure the protection of the Miles' interest in their property.[8]

No one has contested that the Miles had a legal contract with the FmHA, a contract which created a constitutionally-protected property interest. The failure of the FmHA to adhere to its mandatory regulations in the delineation of wetlands thereby interfered with a constitutionally-protected property interest. Therefore, this Court should grant *certiorari* in this case.

E. The Decision Of The Ninth Circuit Court Of Appeals Panel Raises Critical Issues Of National Significance.

Wetlands designations affect millions of acres of public and private land in all fifty states. Wetlands designation, and the ability of federal agencies to impose their

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[8] In an analogous situation, the Eighth Circuit Court of Appeals held: "A FmHA loan, once made, creates a statutory entitlement and a property interest protected by the due process clause of the Fifth Amendment." *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774, 782 (8th Cir. 1984).

will upon millions of acres of public and private lands has not only given rise to untold public controversy, but to numerous grass-roots groups throughout the nation raising concerns regarding the future of private property.

It is essential that federal agencies be guided by the federal regulations adopted by those agencies and not be able to delineate wetlands by agency "consensus" on a case-by-case basis as occurred upon the Miles' ranch. Therefore, this Court should grant *certiorari* in this case.

II. The Holding Of The Ninth Circuit Court Of Appeals Panel That The Miles Could Not Sue The United States Government For Its Failure To Abide By Its Own Regulations Merits Review By This Court.

A. The Decision Of The Ninth Circuit Court Of Appeals Panel Conflicts With the Holding Of This Court.

The Administrative Procedure Act and Supreme Court precedent both establish that the U.S. Government may not use sovereign immunity to extinguish claims based upon the Government's failure to abide by its own regulations. However, the Ninth Circuit Court of Appeals Panel held the opposite. As a result, this Court should grant the Petition and eliminate this conflict.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702. The APA specifically waives sovereign immunity with respect to such actions, stating:

> an action . . . seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity shall not be dismissed nor relief therein be denied on the ground that [the action] is against the United States.

Id.

In *Bowen v. Massachusetts*, 479 U.S. 879 (1988), this Court applied these provisions. The issue in the case was whether the State of Massachusetts could sue the U.S. Department of Health and Human Services (HHS) for reimbursement of costs incurred by Massachusetts under the Medicaid program. Federal law established that the state had a right to the money. However, HHS claimed that sovereign immunity barred the lawsuit.

The Court rejected the position of HHS, concluding that Massachusetts merely sought to require HHS to comply with the federal Medicaid Act and HHS' own implementing regulations.[9] The Court summarily rejected the claim of sovereign immunity:

> the question . . . is governed by the plain language of [the APA]. It seems perfectly clear that, as the reviewing court, the District Court had the authority to "hold unlawful and set aside

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[9] HHS asserted that the complaint stated a claim for money damages. However, Massachusetts only sought those monies to which it was statutorily entitled. Thus, the Court ruled that the state's suit merely sought to enjoin arbitrary and capricious action and did not seek money damages.

> agency action" that it found to be "not in accordance with law" [quoting 5 U.S.C. §706(2)(A)].

Bowen, 487 U.S. 879, 911.

In the present case, the Miles sought to hold the FmHA to its own regulations concerning "wetlands" easements. The FmHA's failure to abide by these rules was "not in accordance with law" and hence should have been set aside. However, the Ninth Circuit Court of Appeals Panel held that, due to sovereign immunity, it could not grant the Miles a remedy. This decision violated the clear language of the Administrative Procedure Act as well as this Court's ruling in *Bowen*.

It is essential that judicial review be available to remedy illegal agency action. Therefore, this Court should grant *certiorari* in this case.

B. The Decision Of The Ninth Circuit Court Of Appeals Panel Is In Conflict With Prior Holdings Of The Ninth Circuit Court Of Appeals.

In holding that the U.S. Government had not consented to be sued, and was thus immune from suit under the doctrine of sovereign immunity and that the District Court did not have jurisdiction over the Miles' contract claims, the District Court relied upon *North Side Lumber v. Block*, 753 F.2d 1482 (9th Cir. 1985), *cert. denied*, 474 U.S. 931 (1985). In *North Side* the Ninth Circuit Court of Appeals held that the Little Tucker Act, 28 U.S.C. §1346, did not waive sovereign immunity and, thus, was an insufficient basis for conferring jurisdiction over a contract claim against the United States.

The Ninth Circuit Court of Appeals Panel erroneously approved the foregoing analysis by the District Court. In so doing, the Ninth Circuit Panel placed itself at odds with other holdings of the Ninth Circuit, specifically that of *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980).

In *Rowe*, Plaintiffs had submitted bids for oil and gas leases in Alaska. The Secretary of the Interior selected Plaintiffs as recipients of the leases but then awarded the leases to a third party. Plaintiffs sued, claiming that the Secretary was contractually bound to issue the leases to them.

In *Rowe*, the Ninth Circuit Court of Appeals held that the phrase "valid existing rights" as contained in the Alaska Native Claims Settlement Act permitted a contract action, declaring: "[P]laintiffs' contract argument . . . was directed not only to a claim for money damages, but to a review of the Secretary's decision." *Rowe* at 801. The Court further held:

> The district courts have jurisdiction, without regard to amount in controversy, over actions against the United States, its agencies or its officers acting in their official capacities, 28 U.S.C. §1331(a). *The Administrative Procedure Act (APA) provides for judicial review of agency action and a waiver of sovereign immunity in an action for relief other than money damages that states a claim that a federal agency or officer failed to act as required in an official capacity.* 5 U.S.C. §702; *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978). *If this were strictly review of agency action, the district court would have had jurisdiction.* We hold that the district court had jurisdiction over this case, as a review of agency action, except to the extent

> that the plaintiffs claim damages in excess of $10,000. (Footnotes omitted.)

Rowe at 801. (Emphasis added.)

The Ninth Circuit has consistently preserved the holding of *Rowe* although it has had ample opportunity to overrule that decision. As recently as 1991, the Ninth Circuit, in its decision in *Price v. United States General Services Administration*, 894 F.2d 323 (9th Cir. 1990), distinguished *Rowe* and stated: "Our decision in *Rowe* (cite omitted) . . . [is] inapposite since . . . [it] involved unique statutory rights not at issue here." *Price* at 324.

In *Rowe*, the Ninth Circuit Court of Appeals held that the Tucker Act does not preclude review of agency action when such relief is sought in addition to money damages. 633 F.2d at 802. The Court reaffirmed this holding in *Laguna Hermosa Corp v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981), ruling that the Tucker Act does not impliedly forbid the issuance of a declaratory judgment.[10] Both *Rowe* and *Laguna* involved contractual rights, rights which the Ninth Circuit Court of Appeals permitted to be enforced through an action against the U.S. Government. Neither case states nor implies that jurisdiction is limited to cases involving statutory claims.

Yet another decision by the Ninth Circuit Court of Appeals adhering to the principles of *Rowe* was *Lehner v. United States*, 685 F.2d 1187 (9th Cir. 1982), *cert. denied*, 460

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[10] In *Laguna Hermosa*, plaintiff sought a declaratory judgment that it possessed contract rights against the U.S. Government. Although there were statutory rights, the main thrust of plaintiff's claim was one of contract.

U.S. 1039 (1983). *Lehner* involved a claim for equitable relief based upon an alleged breach of contract by the U.S. Government. Relying upon *Rowe*, the Court held that the APA waived sovereign immunity for the equitable claims presented by *Lehner*. 685 F.2d at 1190.

The Miles not only seek to enforce their contract with the U.S. Government, but more importantly, they seek to enforce rights provided them not only under the APA but also under the Food Security Act. Thus the instant case is strictly analogous to *Rowe* since the relief requested by the Miles is based upon statutory rights expressly granted in the Food Security Act and the regulations promulgated thereunder.[11] In fact, the U.S. Government admits that the Food Security Act granted the Miles lease-back/buy-back rights. Supplemental Memorandum of Law In Support of Governments' Motion to Dismiss, page 2, lines 15-17. As in *Rowe*, it is these rights which the Miles seek to enforce and which, in accordance with the

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[11] The Food Security Act of 1985 provides:

> The Secretary shall give preference in the sale or lease, with option to purchase, of property that has been foreclosed, purchased, redeemed, or otherwise acquired by the Secretary to persons in the following order:
>
> (i) The immediate previous borrower-owner of the acquired property.

7 U.S.C. §1985 (e)(1)(C)(i).

The regulations promulgated under the Food Security Act provide that the Miles can lease with an option to purchase the ranch the FmHA obtained from the Miles. 7 C.F.R. §§1955.66 and 1955.109.

decision of the Court in *Rowe*, they have the right to enforce.

Further, the Miles have rights granted under the APA. As the Ninth Circuit Court of Appeals held in *Rowe*, the APA provides for judicial review of agency action and a waiver of sovereign immunity. *Rowe*, at 801. The Ninth Circuit Court of Appeals held that sovereign immunity is waived in a "claim that a federal agency or officer failed to act as required in an official capacity." *Rowe*, at 801. That is exactly what occurred here. The FmHA failed to act as required by federal law and thereby, under the APA, has consented to be sued.

The holding of the Ninth Circuit Court of Appeals Panel that the U.S. Government has not consented to be sued is in clear and irreconcilable conflict with the holdings of the Ninth Circuit Court of Appeals. Therefore, this Court should grant *certiorari* in this case.

C. The Decision Of The Ninth Circuit Court Of Appeals Panel Raises Important Constitutional Issues.

The rights of the Miles in property in which they held an interest have been adversely affected by the decision of the U.S. Government to designate 58% of that property as "wetlands." However, as a result of the holding of the Ninth Circuit Court of Appeals Panel the Miles have been denied the opportunity to maintain an action against the U.S. Government for the Government's violation of federal regulations, a violation which denied the Miles their property rights. Therefore, this Court should grant *certiorari* in this case.

III. The Holding Of The Ninth Circuit Court Of Appeals Panel That The U.S. Government May Have The Benefit Of Its Bargain With The Miles Despite The U.S. Government's Failure To Adhere To The Federal Regulations Adopted To Protect The Miles Merits Review By This Court.

The Ninth Circuit Court of Appeals upheld the Opinion of the District Court where the District Court held:

> [T]he court cannot find as a matter of law that the government did not violate 7 C.F.R. §1955.137. However, the court finds that *even if the government violated §1955.137 by failing to give the Miles notice of the wetlands easement* when they entered into the lease, *the remedy for such a violation is not to set aside the easement*, but is at most rescission or an action for damages.

(App. at 14 and 45). (Emphasis added.)

To reiterate, the Miles conveyed their land to the FmHA in relief of the debt which they owed to the FmHA in exchange for a lease-back/buy-back option. Exercising the lease-back portion of the option, the Miles remained upon the ranch. However, subsequently, when the Miles sought to exercise the buy-back portion of the option, they were told that the ranch would be encumbered with a "wetlands" easement.

Even though federal regulations required the U.S. Government to notify the Miles of the U.S. Government's ability to impose a "wetlands" easement upon the ranch,

the Government failed to do so.[12] As a result, without knowing of the ability of the U.S. Government to encumber their ranch, the Miles transferred it to the U.S. Government.

The District Court held that while it could not rule that the Government "did not violate" federal regulations, the only remedy for the Miles was that of rescission of the lease, not rescission of the wetlands easement. Thus, the U.S. Government, while not complying with the regulations by which it could impose wetlands easements – particularly those provisions which protected the interests of private citizens – could nonetheless impose the wetlands easement.

The District Court and the Ninth Circuit Court of Appeals Panel are clearly in error. The remedy for the failure of an agency to observe its own regulations is not rescission or damages but the setting aside of the agency's illegal action. The Court of Appeals for the Third Circuit held in *Frisby v. United States Department of Housing & Urban Development*, 755 F.2d 1052 (3rd Cir. 1985) that:

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[12] 7 C.F.R. §1955.137(a)(2)(i) requires that prospective purchasers be notified "at the time of first inquiry . . . that the property is located in a . . . wetland area and specify any use restrictions resulting from this location."

The U.S. Government admits the purpose of this regulation: "Clearly this requirement is intended to protect lessees and buyers, to prevent FmHA from leasing or selling land as though it were unencumbered, when its use is in fact severely restricted." *See* Defendants' Memorandum of Law in Support of Motion for Dismissal, page 8, lines 18-20.

> [T]he agency itself is bound by its regulations. (citing authority) Failure on the part of the agency to act in compliance with its own regulations is *fatal to such action.* (citing authority) Such actions are "not in accordance with law" (citing authority).

Frisby at 1055. (Emphasis added.) *See also*:

> When an administrative agency promulgates rules to govern its proceedings, *these rules must be scrupulously observed.* See *Service v. Dulles* (1957), 354 U.S. 363 . . . . For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, *it denies itself the right to violate these rules. United States ex rel. Accardi v. Shaughnessy* (1954), 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681. If an agency in its proceedings violates its rules and prejudice results, *any action taken as a result of the proceedings cannot stand.*

Pacific Molasses Company v. F.T.C., 356 F.2d 386, 389-390 (1966). (Emphasis added.)

In fact, that is exactly what the APA requires:

The reviewing court shall –

(1) *compel agency action unlawfully withheld* or unreasonably delayed; and

(2) *hold unlawful and set aside agency action, findings, and conclusions found to be* –

> (A) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*
>
> (B) contrary to constitutional right, power, privilege, or immunity;

> (C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*
>
> (D) *without observance of procedure required by law;*

5 U.S.C. §706. (Emphasis added.)

The Ninth Circuit Court of Appeals Panel concluded erroneously that the remedy available to the Miles for the U.S. Government's failure to abide by its own regulations regarding the creation of wetlands easements was not the rescission of the illegal easement, but merely the rescission of the execution of the lease-back option exercised by the Miles. The conclusion of the Ninth Circuit Court of Appeals Panel is contrary to the holdings of other circuits and to the clear intent of the APA. Therefore, this Court should grant *certiorari* in this case.

CONCLUSION

For the reasons stated above, this Petition for a *Writ* of *Certiorari* should be granted.

WILLIAM PERRY PENDLEY*
TODD S. WELCH
JOHN G. NELSON
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

*Counsel of Record

May, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES and DOROTHY L. MILES, Plaintiffs, v. CLAYTON YEUTTER, Secretary of Agriculture; THE UNITED STATES DEPARTMENT OF AGRICULTURE; NEIL SOX JOHNSON, Administrator of the Farmers Home Administration; and THE FARMERS HOME ADMINISTRATION, Defendants.	)	CV No. 89-1348-PA **OPINION** (Filed July 3, 1990)

WILLIAM PERRY PENDLEY
KAREN A. KISHBAUGH
TODD S. WELCH
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, CO 80264

SCOTT HORNGREN
Haglund & Kirtley
101 SW Main, Suite 700
Portland, OR 97294

Attorneys for Plaintiffs

CHARLES H. TURNER
United States Attorney
District of Oregon

WILLIAM W. YOUNGMAN
Assistant United States Attorney
312 U.S. Courthouse
620 SW Main Street
Portland, OR 97205

Attorneys for Defendants

PANNER, J.

The matters before the court are:

1. the motion of the defendants to dismiss the complaint or for summary judgment (#16); and

2. the trial by the court of the remaining issues in this action.

FACTS

In 1980 Myron and Dorothy Miles purchased a cattle ranch in Baker County, Oregon, receiving financing in the amount of $250,000 from the Farmers Home Administration (FmHA). The FmHA is a sub-agency of the United States Department of Agriculture. The loan from the FmHA was secured by a second mortgage on the ranch, junior to the real estate contract from the previous owners of the ranch, the Davises.

On August 17, 1984 the FmHA sent the Miles a pretermination notice based on the Miles' non-payment of the FmHA loan. On February 28, 1985 the Davises sent a notice of forfeiture based on the Miles' default under the real estate contract. In May, 1985 the FmHA county supervisor negotiated a discount on the Davis contract, recommending that the FmHA pay the Davis contract and acquire the ranch.

On November 22, 1985 the Miles deeded the ranch to the FmHA in lieu of foreclosure and in full satisfaction of their debts. The Miles allege that this was done with a verbal agreement that the Miles had the right to lease the property and the right to repurchase the property in the same condition within three years from the time of the written lease. The FmHA then paid off the Davis contract and wrote off the Miles' debt in the amount of $269,871.76.

On December 23, 1985 Congress passed the Food Security Act, 7 U.S.C. § 1985, which requires the FmHA to offer lease-back/buy-back rights to former owners of FmHA inventory property. On April 23, 1986 the FmHA issued regulations implementing the lease-back/buy-back programs, which are set out in 7 CFR 1955.137. On May 29, 1986 the FmHA notified the Miles of the opportunity to be considered for the lease-back/buy-back program. In a letter dated June 27, 1986, the Miles requested a three year purchase option, indicating that they were not in a position to exercise the option to repurchase at that time.

The Miles and the FmHA executed a written agreement, in the form of a one-year lease, to continue year-to-year until notice of termination by either party. The lease was executed March 13, 1987, but was made effective as of November 1, 1986. The words "includes a lease option request per FmHA regulations" were added to the lease at the request of the Miles. The expiration date for the three-year option to purchase under the lease was November 1, 1989.

In May, 1987 the FmHA and the United States Fish and Wildlife Service (FWS) entered into a memorandum of understanding relating to conservation of resources located on FmHA inventory property. On January 11, 1988 the FmHA requested that the FWS inspect the Miles property, identify any important resources and recommend appropriate conservation measures. On February 12, 1988 the FmHA issued an administrative notice requiring that conservation easements be included, as appropriate, on all conveyances of FmHA inventory property (AN No. 1727(1955)). The notice establishes specific language for easements on properties containing wetlands as identified by the FWS.

On February 25, 1988 the FWS informed the FmHA of the existence of a wetlands complex on the Miles ranch and recommended that the entire 1,046 acre tract be restricted. In a letter dated May 27, 1988, the FWS recommended to the FmHA that title to the property be transferred to the FWS or that it be protected by a conservation easement. On October 13, 1988, representatives of FmHA, FWS, the United States Soil Conservation Service (SCS), the Oregon Department of Fish and Wildlife (ODFW), and Myron Miles inspected the property and staked out wetland boundaries. The easement area as staked contains approximately 609 of the property's 1046 acres.

On February 8, 1989 the FmHA gave written notice to the Miles that it would honor the lease/option agreement dated November 1, 1986, but that a wetlands easement would be imposed. On March 11, 1989 the Miles notified the FmHA that they were exercising their option to purchase the ranch. On March 15, 1989 the FmHA notified

the Miles in writing that the FmHA would not proceed with a sale of the property until wetlands boundaries were surveyed and an appraisal performed.

On April 20, 1989, a final visit was made to the property by representatives of the FmHA, FWS, ODFW and SCS in order to review the easement boundaries. At that time a survey of the easement boundaries was being completed. The government representatives determined that the easement boundaries were correctly placed. On September 27, 1989 the FWS informed the FmHA that the ranch also contains a remnant population of a plant species, *Thelypodium howellii* ssp. *spectabilis,* which is under consideration for listing as a threatened or endangered species, and that the plant population is being degraded because of cattle grazing.

On October 27, 1989, the FmHA obtained an appraisal establishing a capitalization value of $153,040 and a market value of $170,00 [sic] for the ranch subject to the conservation easement. On October 31, 1989 the FmHA offered the ranch to the Miles for $153,000, subject to a wetlands easement affecting 609 of its 1,046 acres. Cattle grazing would be precluded or limited in the easement area, and transport of cattle through the easement area would be restricted to certain routes. Some of the restrictions imposed by the easement could be temporary, if the easement manager determines that the wetlands have recovered from the overgrazing.

On November 30, 1989 the Miles entered into a limited lease with the FmHA, extending the option to purchase, and establishing the wetlands conservation easement on April 1, 1990 in the event that the lease

should extend beyond that date. The Miles reserved their right to challenge the imposition of the wetlands easement.

The Miles' complaint contains sixteen claims for relief, all focusing on the request that the FmHA be required to transfer the ranch to them without any conservation or wetlands easement:

The first claim is for breach of verbal contract/specific performance;

The second claim is for redemption rights in the property;

The third claim is for breach of the option to purchase/specific performance and damages;

The fourth claim is for specific performance of a written contract because the possibility of a wetlands easement was not contemplated in the contract;

The fifth claim is to set aside the wetlands easement for failure to comply with administrative regulations in 7 CFR 1955.137(a)(2)(i) which require that prospective purchasers of FmHA lands be notified of wetlands restrictions;

The sixth claim is to set aside the wetlands easement for failure to comply with Executive Order 11990;

The seventh claim is to set aside the wetlands easement for failure to comply with 7 CFR 1955.137(a)(l) by proposing property for lease without specifying restrictions in the lease or conveyance;

The eighth claim is to set aside the FmHA's action as arbitrary and capricious, on the ground that the FmHA

has caused the United States to lose part of the value of the property due to the imposition of the easement;

The ninth claim is to set aside the FmHA's action because the property in question does not fall within the definition of wetlands in Executive Order 11990;

The tenth claim is to set aside the FmHA's action because the property in question does not fall within the definition of wetlands in the Food Security Act;

The eleventh claim is to set aside the FmHA's action because the FmHA failed to make its own independent determination regarding the designation of wetlands;

The twelfth claim is to set aside the FmHA's action for failure to use scientifically accepted methods in delineating the wetlands easement;

The thirteenth claim is for deprivation of contractual and property rights in violation of the Fifth Amendment;

The fourteenth claim is for a taking of private property without just compensation in violation of the Fifth Amendment;

The fifteenth claim is for violation of the substantive due process rights of the Miles under the Fifth Amendment because any wetlands characteristics of the property were artificially created by irrigation; and

The sixteenth claim seeks an order of mandamus requiring the FmHA to transfer the property to the Miles without an easement.

The Miles pray for an order of mandamus, unspecified damages, an order of specific performance, a

permanent injunction, and for a declaratory judgment that the action of the FmHA was illegal and void.

THE MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

On a motion to dismiss a cause of action under Fed. R. Civ. P. 12(b)(6) the court views the complaint in the light most favorable to the pleader and must generally accept as true the facts alleged. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981). The court should dismiss a claim for failure to state a cause of action only when it appears beyond doubt that the pleader can prove no set of facts supporting relief on the claim. *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Where different inferences can be drawn, summary judgment is inappropriate. *Sankovich v. Life Ins. Co. of No. America*, 638 F.2d 136, 140 (9th Cir. 1981).

1. Contract Theories

The first, third, and fourth claims are based on contract theories, as is the sixteenth claim (mandamus), in part. The threshold question raised by the government's motions is whether this court has subject matter jurisdiction over the contract claims.

The government contends that this court lacks jurisdiction over the contract claims because the Miles seek only declaratory relief, specific performance, mandamus and other injunctive relief. The government argues that the United States has not waived sovereign immunity with respect to suits to enforce contracts against the United States by specific performance or other equitable relief. The Miles respond that jurisdiction for their contract claims may be found under: 1) the Little Tucker Act, 28 U.S.C. § 1346(a)(2); 2) 28 U.S.C. § 1331 (federal question jurisdiction); 3) 28 U.S.C. § 1361 (mandamus); 4) the Administrative Procedure Act, 5 U.S.C. § 701 et seq.; and 5) the Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202.

Under 28 U.S.C. § 1331, district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A claim based on a contract with the United States arises under federal law because the federal common law of contracts governs such claims. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985). However, section 1331 is not sufficient to confer jurisdiction over a contract claim against the United States, because section 1331 does not waive the sovereign immunity of the United States. *Id.*

In *North Side,* the Ninth Circuit held that the Little Tucker Act, the Administrative Procedure Act (APA), and the Declaratory Judgments Act do not waive the sovereign immunity of the United States for contract claims seeking declaratory or injunctive relief. 753 F.2d at 1485. In its opinion in the case of *Thomas Creek Lumber & Log Co. v. United States,* CV No. 89-135PA (May 15, 1989, J. Panner), this court discussed the *North Side* decision and other decisions at length and concluded that this court is bound by the Ninth Circuit's reasoning as set out in *North Side.*

The *North Side* opinion distinguished the decisions relied upon by the Miles, *Rowe v. United States,* 633 F.2d 799 (9th Cir. 1980), *cert. denied,* 451 U.S. 970 (1981), and *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376 (9th Cir. 1981). The court limited these cases to their specific facts, which dealt with claims that were contract-related but that rested at bottom on statutory rights. 753 F.2d at 1485. The Ninth Circuit repeated this characterization of the *Rowe* and *Laguna Hermosa* decisions in its recent opinion in *Price v. U.S. General Services Admin.,* 894 F.2d 323 (9th Cir. 1990).

The *North Side* decision did not discuss whether the statutes authorizing mandamus relief could support jurisdiction over a contract claim. However, the Ninth Circuit rejected such jurisdiction in *White v. Administrator of GSA,* 343 F.2d 444 (9th Cir. 1965). In *White,* the plaintiffs purchased land from the United States which was supposed to be subject to an easement of 20 feet in width. The deed received by the plaintiffs described the easement as 79 feet in width. The court held that the plaintiffs' suit for mandamus was essentially a suit for specific performance

of the real estate contract, and that the United States had not waived sovereign immunity with respect to such suits. 343 F.2d at 445-46.

In *North Side*, the Ninth Circuit ruled that the district courts may have jurisdiction over claims which are related to a contract with the government, to the extent that such claims are based upon extra-contractual statutory obligations. 753 F.2d at 1486. This opinion discusses the Miles' claims which are based on alleged extra-contractual statutory or constitutional obligations in the following sections. It is clear, however, that under the decisions in *North Side* and *Thomas Creek*, this court does not have jurisdiction over the Miles' claims which are based on contract theories.

Accordingly, the motion to dismiss is granted with respect to the Miles' contract claims (the first, third and fourth claims, and the sixteenth claim for mandamus, to the extent that it is based on a contract theory).[1]

2. Administrative Procedure Act

The fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth claims are challenges to agency action under the APA.

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[1] The Miles seek unspecified money damages in their complaint, and indicate in their opposition to this motion that they are not seeking more than $10,000 in damages. The Little Tucker Act grants the district courts jurisdiction over contract claims for money damages which do not exceed $10,000. However, the Miles have not alleged any facts which would support an award of money damages, and it appears that their action is primarily one for nonmonetary relief.

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The section waives the sovereign immunity of the United States for claims "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Id.*

Section 706 of the APA authorizes the reviewing court to compel agency action unlawfully withheld or unreasonably delayed, and to set aside agency action found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. 7 U.S.C. § 706.

The Miles allege two theories for relief under the APA. First, the Miles allege that the government's action in imposing the wetlands easement should be set aside because the government failed to comply with regulations regarding notice of such easements. The Miles cite 7 C.F.R. § 1955.137(a)(l), which states:

> *Use restrictions.* Executive Order 11988, "Floodplain Management," and Executive Order 11990, "Protection of Wetlands," *require the conveyance instrument for inventory property in floodplains or wetlands which is proposed for lease or sale to specify those uses that are restricted under identified Federal, State, and local floodplains or wetlands regulations as well as other appropriate restrictions.* The restrictions shall be to the uses of the property by the lessee or purchaser and any successors, except where prohibited by law, as determined

> by the FmHA official responsible for the conveyance. Applicable restrictions will be incorporated into quitclaim deeds in format similar to that contained in § 1955.116(c) of this subpart with the advice and approval of OGC. Upon application by the owner of any property so affected and upon determination by the appropriate FmHA servicing official that the condition for which a deed restriction was imposed no longer exists, the restriction clause may be released by the State Director. A list of these restrictions will be included in the notices required in paragraph (a)(2) of this section. (emphasis added)

The Miles also rely on 7 C.F.R. § 1955.137(a)(2)(i):

> *Property offered for sale by FmHA. The County Supervisor or District Director will inform prospective purchasers at the time of the first inquiry and in any notice of public sale that the property is located in a special flood, mudslide hazard or wetland area and specify any use restrictions resulting from this location.* The County Supervisor or District Director will also prepare and deliver a written notice to the prospective purchaser at the time the bid or offer to purchase is signed by the purchaser. The prospective purchaser will acknowledge the receipt of the notice. (emphasis added)

The Miles contend that the FmHA violated these regulations by failing to notify them that the ranch contained wetlands or that a conservation easement might be imposed on the ranch when they entered into the lease and option to buy back the ranch. The Miles argue that compliance with these regulations is a prerequisite to the government's ability to impose a wetlands easement

upon the ranch, and that the easement should therefore be set aside and the ranch conveyed to them free of the easement.

The government contends that even if it failed to comply with these regulations, such failure does not prevent the government from imposing a wetlands easement. The government argues that the regulations provide no authority for the sale of wetlands property without a conservation easement, and that the law imposes an affirmative duty to place conservation restrictions on wetlands. The government contends that the only remedy available to the Miles is rescission of their agreement to buy the ranch. Furthermore, the government contends that it adequately complied with the regulations, by giving notice of the wetlands easement before the Miles exercised their option to purchase the ranch.

Based on the record on the motion for summary judgment, the court cannot find as a matter of law that the government did not violate 7 C.F.R. § 1955.137. However, the court finds that even if the government violated § 1955.137 by failing to give the Miles notice of the wetlands easement when they entered into the lease, the remedy for such a violation is not to set aside the easement, but is at most rescission or an action for damages.

A careful reading of § 1955.137 indicates that notice of wetlands restrictions is not intended as a prerequisite to the imposition of such restrictions. Rather, the notice is required as a protection for prospective buyers or lessees, so that the FmHA does not sell or lease land as though it were unencumbered, when its use is in fact restricted by a conservation easement.

The remedies of rescission and money damages are adequate to compensate a buyer or lessee who is injured by the failure to give such notice. The remedy of setting aside the easement is not contemplated by § 1955.137, and would be inconsistent with the policy of Executive Order 11990, which is to protect wetlands through the imposition of conservation easements or other restrictions. The Food Security Act, 7 U.S.C. § 1961 et seq., which created the lease-back/buy-back rights upon which the Miles rely, does not provide any support for the Miles' position.

Therefore, the motion for summary judgment is granted as to the fifth, sixth and seventh claims.

The Miles' second theory for relief under the APA is that the FmHA acted arbitrarily, capriciously, and contrary to law in imposing the wetlands easement because: 1) the property in question does not fall within the definition of wetlands in Executive Order 11990 or the Food Security Act; 2) the FmHA failed to make an independent determination that the wetlands easement should be imposed; and 3) the FmHA failed to use scientifically accepted methods and procedures in delineating the wetlands easement.

The APA provides a mechanism for such challenges to agency action. The government argues that the Miles failed to exhaust their administrative remedies with respect to these issues, but the record contains letters from the FmHA which indicate that the agency regarded its decision regarding the wetlands easement to be final. *See, e.g.,* Plaintiffs' Ex. 35. The government concedes that

there are issues of fact for trial with respect to the merits of these claims.

Therefore, the government's motion to dismiss or for summary judgment is denied as to the ninth, tenth, eleventh and twelfth claims.

3. Right of Redemption

In their second claim, the Miles allege that they have a right to redeem the ranch in the same condition as when they conveyed it to the FmHA, that is, without the wetlands easement. The government contends that the Miles fail to state a cause of action for redemption because under the law of the State of Oregon the right of redemption arises only after the enforcement of a judgment, as in the case of a mortgage foreclosure.

The right to redeem in Oregon is strictly statutory, as set out in ORS 23.520 et seq. Redemption must be pursued in accordance with the applicable statutes, and it is not within the province of the court either to increase or lessen the burden imposed upon a party seeking to exercise redemption. *Stamate v. Peterson*, 250 Or. 532, 533-34, 444 P.2d 30 (1968). The Oregon statutes do not create a right of redemption from a conveyance in lieu of foreclosure such as the present case.

Therefore, the government's motion to dismiss is granted as to the second claim.

4. Eighth Claim – Lack of Standing

In their eighth claim the Miles allege that the government acted arbitrarily, capriciously and contrary to law in

imposing the wetlands easement on the ranch, because the easement greatly reduces the property's appraised value and will cost the United States a substantial sum of money. The government contends that the Miles have no standing to bring this claim because the injury, if any, is to the United States and not to the Miles.

It is a truism that a litigant must show some personal stake in the outcome of the litigation in order to bring a claim against the government. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). The Miles have alleged no injury in their eighth claim that is distinct from the interest held by the public at large. Such a generalized interest of a citizen is not sufficient to confer standing to challenge a governmental action. *Animal Lovers Volunteer Ass'n, Inc. v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985).

Therefore, the government's motion to dismiss is granted as to the eighth claim.

5. Fifth Amendment Claims

In their thirteenth, fourteenth and fifteenth claims, the Miles allege that the imposition of the wetlands easement violates their rights under the Fifth Amendment. The thirteenth claim alleges that the Miles have a contractual option to purchase the property in the same condition as they conveyed it, and that the easement constitutes a taking of property rights without just compensation.

The fourteenth claim alleges that the imposition of the easement will render the remainder of the property

uneconomical for ranching, impairing the Miles' use and enjoyment of the property without just compensation.

The fifteenth claim alleges that, to the extent that the regulations characterize artificially created wetlands as wetlands subject to a conservation easement, such regulations are not sufficiently connected to the public welfare interest and constitute a violation of the substantive due process rights of the Miles under the Fifth Amendment.

The weakness in these claims is that the property in question belongs to the FmHA, and not to the Miles. As discussed above, the Miles do not have contractual or property rights in the property, other than the opportunity to lease and/or to purchase the property provided by the Food Security Act. These rights are subject to all applicable regulations, including the affirmative requirement that wetlands be protected through the imposition of conservation easements or other restrictions. Thus, this case is distinguishable from the decision in *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), which concerned property that was under private ownership at all times.

Furthermore, the Fifth Amendment prohibits only uncompensated takings. The undisputed facts establish that the FmHA is offering the property to the Miles at a reduced price, based on an appraisal of the property's value subject to the conservation easement.

Finally, the Miles provide no support for their argument that regulations which require the imposition of a conservation easement on artificially created wetlands are not sufficiently connected to the public welfare interest under the Fifth Amendment. Although the court has

not been able to locate any discussion of this issue under Executive Order 11990 or the Food Security Act, the Ninth Circuit recently addressed this issue in the context of the Clean Water Act, 33 U.S.C. § 1251 et seq. In *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990), the court held that artificially created wetlands were properly included in the definition of wetlands under the Clean Water Act, if such wetlands supported wetland vegetation under normal circumstances. Implicit in this holding is the assumption the regulation of artificial wetlands is consistent with the public welfare.

Therefore, the court finds no genuine issues of material fact with respect to the thirteenth, fourteenth and fifteenth claims.

6. Conclusion

The government's motion to dismiss is granted as to the first, second, third, fourth and eighth claims, and the sixteenth claim for mandamus, to the extent that it is based on a contract theory. The government's motion for summary judgment is granted as to the fifth, sixth, seventh, thirteenth, fourteenth and fifteenth claims. The government's motion to dismiss or for summary judgment is denied as to the ninth, tenth, eleventh, and twelfth claims, and the sixteenth claim, to the extent that it is based on the APA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came before the court for trial on April 23, 1990. By stipulation the parties waived their right to

cross-examine witnesses and submitted the evidence to the court in documentary form. The court, having considered the evidence and the legal arguments of the parties, enters these Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a).[2]

The only issues left for decision by the court are the issues raised by the Miles' claims for relief under the APA. The Miles contend that the property does not contain wetlands as defined in Executive Order 11990 and in the Food Security Act. The Miles also contend that the FmHA failed to use the proper methods to delineate the wetlands easement.[3]

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA provides the following standards for review:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

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[2] The court incorporates the statement of facts set out above as part of its Findings of Fact.

[3] The Miles appear to have dropped their contention that the FmHA failed to make an independent determination that the wetlands easement should be imposed.

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law;
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

Agency action is entitled to a presumption of regularity, and the burden of proof rests with the party alleging irregularity. *Frisby v. U.S. Dept. of Housing & Urban Devel.*, 755 F.2d 1052, 1055 (3d Cir. 1985). Agency action

may not be set aside on the grounds that it is arbitrary and capricious if the action is rational, based on relevant factors, and within the agency's statutory authority. *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

The Miles contend that any wetlands characteristics on the property exist only because the property has been regularly irrigated, and that such artificial wetlands do not fit within the definition of wetlands in Executive Order 11990 or the Food Security Act. Executive Order 11990, § 6(c) defines wetlands as:

> The term "wetlands" means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

The Food Security Act defines wetlands as:

> The term "wetland", except when such term is part of the term "converted wetland", means land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

16 U.S.C. § 3801(a)(16).

The Miles contend that although irrigated land may appear to possess the characteristics of wetlands, such characteristics would not be present "under normal circumstances," i.e., if the irrigation was discontinued. There are two difficulties with this argument. First, the witness statement of Myron Miles is the only evidence that the wetlands characteristics of the property were created by irrigation. Miles simply states:

> I have been grazing my cattle since I purchased the ranch in 1979 and I have not adversely affected the alleged wetlands area. In fact I believe any wetlands characteristics which may be present on the property have been created by my activities and the activities of previous owners. My predecessors and I have irrigated the land and our irrigation activities have created any wetlands characteristics which may be present on the property.

Witness Statement of Myron Miles, p.4, 11.17-25.

Miles does not claim any education or expertise in the field of identifying wetlands. More significantly, Miles provides no information as to the nature or extent of the claimed irrigation. The administrative record shows that three natural streams flow through the property, the Powder River, the North Powder River and Hot Creek. Defendants' Ex. 127. The record includes photographs of these streams, and of some of the wetland areas associated with them. *See* Defendants' Ex. 136, 138-41. The soils map and wetland inventory maps of the property produced by the FWS and SCS show extensive areas of wetlands and hydric soils in the vicinity of these streams. Defendants' Ex. 129, 130.

Based on this record, the court finds that there are substantial areas of natural wetlands on the property. The Miles provide no evidence which could be used to distinguish between the portion of the wetlands which is attributable to the natural streams, and the portion of the wetlands, if any, which is attributable to irrigation. Therefore, the Miles have not met their burden to produce evidence in support of their claim that any wetlands characteristics of the property were created by irrigation.

Moreover, the fact that wetlands may have been artificially created does not necessarily mean that they are excluded from the definitions of wetlands in Executive Order 11990 and in the Food Security Act. As discussed above, the court has not located any cases which discuss the applicability of these definitions to artificial conditions. However, in *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990), the Ninth Circuit held that the definition of wetlands under the Clean Water Act, 33 U.S.C § 1251 et seq., includes man-made wetlands.

The Clean Water Act, like Executive Order 11990 and the Food Security Act, defines a wetland as an area that "under normal circumstances" supports wetland vegetation. 33 CFR § 328.3(b). The court adopts the reasoning of *Leslie Salt*, and finds that irrigated areas that otherwise meet the criteria for wetlands come within the scope of the definitions of wetlands under Executive Order 11990 and the Food Security Act. Therefore, if the FmHA included irrigated areas within the conservation easement, this action was not arbitrary, capricious, an abuse of discretion or in excess of statutory authority.

Turning to the Miles' contention that the FmHA failed to use the proper methods to delineate the wetlands easement, the administrative record indicates that in a letter dated June 27, 1989, the Miles objected to the method used to determine the boundaries of the easement and requested that the easement boundaries be redetermined, using the Federal Manual for Identifying and Delineating Jurisdictional Wetlands. The Miles complained that the easement boundaries were determined in an arbitrary, hasty and unscientific manner by persons who were not properly trained. Defendants' Ex. 132.

The process of identifying the wetlands on the property began in January, 1988, when the FmHA requested that the FWS inspect the Miles property, identify any important resources and recommend appropriate conservation measures. This action was taken pursuant to a memorandum of understanding (MOU) between the FmHA and the FWS which requires the FmHA to use the FWS as its technical consultant in implementing the FmHA's duty to protect wetland resources pursuant to Executive Order 11990 and the Food Security Act. The MOU requires that the FWS survey the inventory properties held by the FmHA, identify any wetlands present on such property, and assist the FmHA in protecting the wetlands, either by transferring the property to permanent public ownership, or through the development of lease or deed restrictions. Plaintiffs' Ex. 7, pp.3-5.

On February 25, 1988, the FWS informed the FmHA that the Miles ranch contained "a fairly extensive wetland complex comprised of seasonal ponds, a stream, and associated wetland, riparian and upland vegetation." Defendants' Ex. 115. In a letter dated May 27, 1988, the

FWS recommended that the entire property should be transferred to the FWS or to the Oregon Department of Fish and Wildlife (ODFW), or if that was not possible, that a conservation easement should be imposed on all but 170 acres of the property. Defendants' Ex. 126.

The FmHA resisted the suggestion that the entire property be restricted, and on August 23, 1988 the ranch was inspected to determine the extent of the wetlands. The persons present were Billy Clonts, county supervisor for the Baker County, Oregon office of the FmHA; Daniel Fraser, state environmental coordinator for the FmHA, Patrick Wright, a senior staff biologist for the FWS; Charlie Craig, a fish and wildlife biologist for the FWS; Jack Milland, a wildlife habitat biologist for the ODFW; Steve Williams, a fish habitat biologist for the ODFW; Rhoda Portis, district conservationist for the SCS; Baker County Judge Ralph Ward; John Collings and Tony Whyte of the Baker *Democrat Herald,* and Myron and Dorothy Miles.

During this inspection, the representatives of the FWS and ODFW pointed out hydrophytic vegetation, plant life that grows in soil that, for at least part of the year, is saturated with water and deficient in oxygen. Portis used soil maps prepared by SCS to determine that hydric soils were present on a large portion of the property. All of the government representatives agreed that the property contained extensive wetlands and floodplains, and that cattle grazing had severely damaged the riparian and wetland areas along the Powder River and the North Powder River.

On October 13, 1988, Clounts visited the property together with Daniel Fraser; Dave Sill, a fish and wildlife

biologist for the FWS; Jack Milland; Daryl Gowan, a wildlife habitat biologist from the ODFW; Rhoda Portis; and Myron Miles. The boundaries of the wetland were staked under the direction of the professional biologists and soil conservationists present, using National Wetlands Inventory maps, SCS hydric soils maps, and visual observations. Clounts and Fraser made the final determination as to the conservation easement boundary. The easement was designed to include the smallest possible area consistent with protection of the wetlands. As a result, the proposed easement area was reduced from the entire property to 609 acres.

In staking the boundaries of the easement, the government representatives departed from the exact boundary of the wetlands in certain places where following the edge of the wetlands would make it difficult to fence the easement or where small areas would be created that had little practical value either as wetlands or as pasture. The easement includes a buffer zone in some places, in order to protect the wetland areas. The easement area was also designed to exclude an alfalfa field which is irrigated by the Miles and the Miles' home and farm buildings.

Thus, due to these practical considerations, some land which is not wetlands is included in the easement, and some land that qualifies as wetlands is not included in the easement. The proportion of such land is insignificant in relation to the total area of the easement. *See* Defendants' Ex. 128-130 (comparative maps of the conservation easement and of wetlands and hydric soils on the property).

On April 20, 1989, another visit was made to the property in order to review the easement boundaries. At that time a survey of the easement boundaries was being completed. The persons present on April 20 were Clounts, Fraser, Wright, Milland, Portis, David Chen, Oregon State Director of the FmHA; Baker County Judge Ward; Gordon Colton from the Baker County Cattlemen's Association; Kay Markgraft from the Baker County Cowbelles; Myron Miles and Dorothy Miles. During this visit, the government representatives reached a consensus that the boundaries established in October, 1988 were correct.

In addition to these group visits, government biologists and conservationists visited the property on at least three other occasions between 1988 and 1990.

The Miles contend that the boundaries of the easement were determined in an arbitrary, hasty and unscientific manner by persons who were not trained to identify wetlands. The Miles do not identify any qualifications that were lacking in the representatives of the FWS, ODFW and SCS who acted as technical consultants to the FWS. The Miles contend that large areas were included in the easement that do not meet the criteria to be classified as wetlands, but they do not identify any such areas or provide any factual or scientific basis for this contention.

Finally, the Miles argue that the easement boundaries should be redetermined, using the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (the Federal Manual). The FmHA responds that the Federal Manual was not available when the wetlands easement was determined, as it was not published until the fall of 1989. Moreover, the FmHA contends that the method

used to delineate the easement is consistent with the methods described in the Federal Manual. The Miles have not identified any differences in the easement boundaries which would appear if the boundaries were redetermined using the Federal Manual.

The court finds that the Miles have failed to show that the method used to delineate the wetlands easement was deficient in any way. Rather, the administrative record establishes that the FmHA received technical assistance from professional biologists and soil conservationists employed by the FWS, the ODFW and the SCS, and that these professionals applied the definitions of wetlands set out in Executive Order 11990 and the Food Security Act. The boundaries of the easement were determined through a consensus of these professionals, after repeated inspections of the property.

Throughout the process, the FmHA exercised independent judgment, rejecting the initial proposal of the FWS and seeking to establish an easement boundary that allowed ranching operations to continue on the property. The FmHA considered and attempted to meet the needs of the Miles, to the limited extent allowed by Executive Order 11990 and the Food Security Act. If the FmHA erred in any way, it was by excluding certain wetland areas from the easement in order to preserve the Miles' ability to use the remaining portions of the property.

The court finds that the FmHA's action in determining the easement boundaries was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

CONCLUSION

The court finds in favor of the defendants and against the plaintiffs. This opinion shall constitute Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a).

DATED this 29 day of June, 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES and DOROTHY L. MILES, Plaintiffs, v. CLAYTON YEUTTER, Secretary of Agriculture; THE UNITED STATES DEPARTMENT OF AGRICULTURE; NEIL SOX JOHNSON, Administrator of the Farmers Home Administration; and THE FARMERS HOME ADMINISTRATION, Defendants.	CV No. 89-1348-PA **ORDER** (Filed July 3, 1990)

PANNER, J.

The court finds in favor of the defendants and against the plaintiffs.

IT IS SO ORDERED.

DATED this 29th day of June, 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES and DOROTHY L. MILES, Plaintiffs, v. CLAYTON YEUTTER, et al, Defendants.	)	CIVIL NO. 89-1348PA JUDGMENT (Filed July 9, 1990)

Based on the record,

IT IS SO ORDERED AND ADJUDGED plaintiff shall take nothing and this action is dismissed.

DATED: July 9, 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES and DOROTHY L. MILES, Plaintiffs, v. CLAYTON YEUTTER, Secretary of Agriculture; THE UNITED STATES DEPARTMENT OF AGRICULTURE; NEIL SOX JOHNSON, Administrator of the Farmers Home Administration; and THE FARMERS HOME ADMINISTRATION, Defendants.	)	CV NO. 89-1348-PA JUDGMENT (Filed July 12, 1990)

Based on the Court's Order, Opinion and Findings of Fact and Conclusions of Law filed on July 3, 1990, and upon the Court's file and record,

IT IS SO ORDERED that this action is DISMISSED.

DATED this 11 day of July, 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES and DOROTHY L. MILES, Plaintiffs, v. CLAYTON YEUTTER, Secretary of Agriculture; THE UNITED STATES DEPARTMENT OF AGRICULTURE; NEIL SOX JOHNSON, Administrator of the Farmers Home Administration; and THE FARMERS HOME ADMINISTRATION, Defendants.	)	CV No. 89-1348-PA **ORDER** (Filed Oct. 1, 1991)

PANNER, J.

Plaintiffs Myron E. Miles and Dorothy L. Miles bring this action against Clayton Yeutter, Secretary of Agriculture; the United States Department of Agriculture; Neil Sox Johnson, Administrator of the Farmers Home Administration (FmHA); and the Farmers Home Administration. Plaintiffs claimed that the FmHA was required to transfer a ranch to them without a wetlands easement. After a court trial, I found for defendants.

Plaintiffs move for relief from judgment under Federal Rule of Civil Procedure 62(b), claiming that they have newly discovered evidence. I deny plaintiffs' motion.

BACKGROUND

Plaintiffs are leasing about 1050 acres from the FmHA. After the FmHA designated a wetlands easement on 606 acres, plaintiffs brought this action against defendants. Of plaintiffs' sixteen claims, only claims nine through twelve would be affected by this motion. Those claims are (9) the property does not fall within the definition of wetlands in Executive Order 11990; (10) the property does not fall within the definition of wetlands in the Food Security Act of 1985, 16 U.S.C. § 3801(a)(16); (11) the FmHA did not itself determine whether the property should have been designated wetlands; and (12) the FmHA did not use scientifically accepted methods in measuring the wetlands easement. Judgment against plaintiffs on all claims was entered June 28, 1990.

On September 26, 1990, plaintiff Myron Miles (Miles) requested that the United States Soil Conservation Service determine the extent of wetlands on the ranch. On October 18, 1990, Jeffrey Repp, district conservationist, sent Miles a report concluding that the land contained 455.1 acres of wetlands and 77.6 acres of farmed wetlands.

On October 31, 1990, Miles appealed Repp's determination. He contended that some of alleged wetlands would return to sagebrush without irrigation.

On November 29, 1990, Repp made a redetermination. He concluded that the land contained 554 acres of wetlands and 9.7 acres of artificial wetlands.

On December 19, 1990, Miles appealed Repp's redetermination. On May 28, 1991, Gerald Yeomans, area

conservationist, issued a new determination based on the report of Range Conservationist Alan Bahn and Area Conservation Agronomist Richard Fasching. Yeomans stated, "Generally speaking, the main land area, aside from the warm springs area, contains only about 15-20% wetlands." Defendants' Memorandum of Law, Exh. H, at 2. This contrasts with the earlier determinations that the property contained between 500 and 600 acres of wetlands, or about 50% of the property.

STANDARDS

Rule 62(b)(2) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). . . .

The moving party in a rule 60(b)(2) motion must show that the evidence (1) was newly discovered; (2) could not have been discovered through due diligence; and (3) was so important that it would likely have changed the outcome of the case. *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987). Newly discovered evidence must have existed at the time of trial, and evidence of events occurring after the trial is not newly discovered. *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981).

DISCUSSION

Plaintiffs seek to introduce an opinion issued by the United States Soil Conservation Service in May 1991, almost a year after the June 1990 judgment. There are two ways of analyzing plaintiffs' newly discovered expert opinion. Either the opinion is evidence of events that occurred after trial, or it is evidence that plaintiffs could have obtained before trial. Either way, the May 1991 opinion is not newly discovered evidence under Rule 60(b)(2).

I. Evidence of Events Occurring After Trial

Plaintiffs argue that "[t]he facts themselves existed at the time of trial even though the opinion in question did not." Plaintiffs' Reply at 3. However, an expert opinion is not identical to its underlying facts, and different experts often arrive at different conclusions based on the same facts. Here, it seems that each time the land was studied, a different number of wetland acres was reported. The May 1991 opinion is evidence that did not exist at the time of trial.

In *Strobl v. New York Mercantile Exch.*, 590 F. Supp. 875, 878 (S.D.N.Y. 1984), *aff'd*, 768 F.2d 22 (2d Cir.), *cert. denied*, 474 U.S 1006 (1985), the defendant moved for a new trial under Rule 60(b)(2) because of favorable findings of fact issued in a separate proceeding by an administrative law judge (ALJ) after the trial. The court held that because the ALJ's findings did not exist at the time of trial, they were not newly discovered evidence, even though the basis for the ALJ's findings existed before trial. *Id.*

Here, the Soil Conservation Service's opinion was created after the trial, even though the underlying facts existed before trial. It is not newly discovered evidence.

II. Due Diligence

Plaintiffs also contend that they could not have discovered the May 1991 opinion through due diligence. Strictly speaking, plaintiffs are correct, because the opinion did not exist until after the trial. However, plaintiffs could have obtained the same evidence before trial.

I agree with the case cited by defendants, *Aliff v. Joy Mfg. Co.*, 914 F.2d 39 (4th Cir. 1990). In *Aliff*, the court found that expert reports prepared after the trial were not newly discovered evidence because the moving parties could have discovered the same information before trial.

Plaintiffs attempt to distinguish *Aliff*, arguing that the moving parties there commissioned the disputed expert reports, while here plaintiffs were not the source of the new evidence. In fact, the moving parties in *Aliff* did not commission both expert reports. More importantly, the *Aliff* court relied on whether the moving party could have discovered the same evidence before the trial, not on whether the moving party had hired the expert who produced the reports. *Aliff*, 914 F.2d at 44; *see also Ulloa v. City of Philadelphia*, 692 F. Supp. 481, 485 & n.7 (E.D. Pa. 1988) ("a revised opinion based on then-available facts, even if credible, is not 'newly discovered evidence' "); *State of Michigan v. City of Allen Park*, 573 F. Supp. 1481, 1486 (E.D. Mich. 1983). Here, plaintiffs could have hired an expert before trial to study the same facts relied upon by the Soil Conservation Service expert.

Plaintiffs have not explained why they could not have commissioned their own study before trial.

Because the evidence was not newly discovered I need not address whether it would likely have changed the result.

CONCLUSION

Plaintiffs' motion for relief from judgment (#60) is denied.

DATED this 1 day of October, 1991.

/s/ Owen M. Panner
OWEN M. PANNER,
United States
District Court Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MYRON E. MILES; DOROTHY L. MILES Plaintiffs-Appellants, v. CLAYTON YEUTTER, Secretary of Agriculture; NEIL SOX JOHNSON, Administrator of the Farmers Home Administration; FARMERS HOME ADMINISTRATION; U.S. DEPARTMENT OF AGRICULTURE Defendants-Appellees.	No. 90-35600, 91-36208 D.C. No. CV-89-1348-PA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Chief District Judge, Presiding

Submitted January 29, 1992**

(Filed Feb. 28, 1992)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

Before: GOODWIN, ALARCON and HALL, Circuit Judges.

Myron and Dorothy Miles filed a complaint on December 8, 1989 in an attempt to force the Farmers Home Administration ("FmHA") to convey to them real property in Baker County, Oregon, free and clear of an easement to protect wetlands located thereon. The complaint originally asserted twelve claims for relief, raising primarily contract and administrative procedure issues. An amended complaint was filed, adding three claims under the Fifth Amendment alleging an unconstitutional taking and one claim in mandamus.

The district court found in favor of the United States and against the plaintiffs on all claims. The Court dismissed the Miles' claims based on contract (the first, third, and fourth claims); on mandamus, to the extent based on contract (sixteenth claim); on right of redemption (the second claim); on alleged failure to give notice (the fifth, sixth and seventh claims); on the cost to the government of protecting the subject wetlands (the eighth claim); and on the Fifth Amendment taking clause (the thirteenth, fourteenth, and fifteenth claims).

The district court determined that the remaining claims depended upon whether the property contained "wetlands" as defined in Executive Order 11990 and the Food Security Act, 16 U.S.C. § 3801(a)(16). If so, the court had to consider the extent to which the claims were actions under the Administrative Procedure Act ("APA") subject to review on the record. Based on the facts in the administrative record, the district court found that there

were substantial areas of natural wetlands on the property, and that FmHA's determination of the easement area was not arbitrary, capricious, an abuse of discretion, and was otherwise in accordance with the law.

Plaintiff timely appealed. Argument was scheduled for July 10, 1991. Prior to argument, appellants moved this court for a continuance of oral argument, and, simultaneously, moved for relief from the district court's judgement under Fed. R. Civ. P. 60(b)(2), claiming that it had discovered new evidence. We granted appellants' motion for a continuance pending the district court's determination on the motion for relief from judgement. On October 1, 1991, the district court entered an order denying the Rule 60(b)(2) motion. This decision, also, was timely appealed.

The two appeals have been consolidated and we affirm the district court in all respects.

I.

In 1980, the Miles financed the purchase a 1046 acre cattle ranch in Baker County, Oregon, in part, through a $250,000 FmHA loan secured by both a second mortgage on the property and a chattel mortgage. Four years later, the Miles fell on hard times and defaulted on the FmHA loan. Facing foreclosure in November of 1985, they deeded the ranch to the FmHA, which then payed [sic] off the senior note. The Miles continued their ranching operation at the permission of the FmHA.

One month later, Congress passed the Food Security Act which requires the FmHA to offer lease-back/buy-

back rights to former owners of FmHA inventory property. In compliance with the Act, the FmHA offered the Miles a one-year lease with a three-year option to purchase. The Miles accepted. The lease was executed in March of 1987 and given retroactive effect as of November 1, 1986.

The following year, the United States Fish and Wildlife Service ("FWS") inspected the property leased by the Miles, identified a wetlands complex on the ranch, and recommended that a conservation easement be imposed on the entire 1046 acre tract. After a second inspection, attended by Mr. Miles, representatives of the FmHA, the FWS, the United States Soil Conservation Service ("SCS"), the Oregon Department of Fish and Wildlife ("ODFW"), the FmHA staked out an easement encompassing 609 of the property's 1046 acres.

In February of 1989, the FmHA notified the Miles that a wetlands easement would be imposed on the designated 609 acres. One month later, the Miles attempted to exercise their option to purchase the ranch under the November 1, 1986 lease. The FmHA immediately notified the Miles that the sale would not proceed until after a survey of the wetlands boundaries and an appraisal of the value of the ranch subject to the conservation use restriction.

The appraisal gave the property a capitalization value of $153,040 and a market value of $170,000. The FmHA offered the Miles the capitalization value, subject to the wetlands easement. The easement limited, and in some areas precluded, cattle grazing and transportation. The Miles rejected the offer. In November, 1989, the

FmHA and the Miles entered into a limited lease which extended their option to purchase. The wetlands easements took effect in April of 1990, and the present action followed.

II.

The district court opinion is thorough and well reasoned. Appellants raise little new on appeal, opting to rehash the same issues aired in the initial proceeding. The district court dismissed all contract based claims (the first, third, fourth, and part of the sixteenth claim) for lack of subject matter jurisdiction finding that the government has not waived sovereign immunity. This conclusion is dictated by Ninth Circuit precedence. *See North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985); *Price v. U.S. General Services Admin.*, 894 F.2d 323 (9th Cir. 1990). Plaintiffs' arguments on appeal concerning *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 790 (1981) and *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376 (9th Cir. 1981) are efforts to rehash issues that were considered and rejected in *North Side* and *Price* and persuasively dealt with by the district court. The dismissal of these claims is affirmed.

III.

The fifth, sixth, and seventh claims concerned the effects of the FmHA's alleged failure to provide notice of the impending easement in accordance with 7 C.F.R. § 1955.137. These regulations require the FmHA to incorporate use restrictions into the conveyance instrument and to give prospective buyers notice of the existence of

restrictions such as a wetlands easement. We need not decide the scope of the governments obligations under these provisions to affirm the district court's conclusion that, at most, a person who purchases land without notice of the use restriction is entitled to recision of the agreement or an action for damages. An aggrieved party is not entitled to purchase land unencumbered by the restriction. The FmHA has no authority to sell the ranch in question without first imposing an easement to protect the designated wetlands.

IV.

The plaintiffs challenge the district court's definition of wetlands under Executive Order 11990 and the Food Security Act of 1985, 16 U.S.C. § 3801(a)(16). As a preliminary matter, the plaintiffs fail to demonstrate that the district courts factual finding that the land within the easement were natural and not artificial wetlands was clearly erroneous. There is no dispute that these laws cover natural wetlands. Furthermore, plaintiffs are mistaken as to the legal definition of wetlands. This court has recently held that wetlands, as defined in the Clean Water Act, encompass artificially created wetlands within the federally protected scheme. *See Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991). Plaintiffs' attempts to distinguish this case are unpersuasive. The district court's interpretation was correct.

V.

The plaintiffs challenge the FmHA's designation of the wetlands area as arbitrary and capricious. The district court properly treated these claims as administrative appeals under the APA and based its ruling on the administrative record. We conduct a similar review, *see Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1161 (9th Cir. 1980), and affirm the findings of the district court.

Plaintiffs fail to demonstrate that the methods used in designating the wetlands were deficient. The FmHA received technical assistance from professionals at the FWS, the SCS, and the ODFW. The FmHA conducted on site inspections and made independent assessments, rejecting the FWS's initial classification. The plaintiffs were allowed to participate in the process and the FmHA made efforts to accommodate their concerns. We find the plaintiffs' challenges to the administrative action to be without merit.

VI.

Finally, plaintiffs appeal the denial of their Rule 60(b)(2) motion for relief of judgement due to newly discovered evidence. This evidence consisted of a post trial report from the Soil Conservation Service. Under Rule 60(b)(2), the moving party must show that the evidence (i) is newly discovered; (ii) could not have been discovered through due diligence; and (iii) is so important that it would in all probability change the outcome of the case. *See Costal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 211 (9th Cir. 1987). The denial of a Rule 60(b) motion is reviewed for abuse of discretion. *Thompson v.*

Housing Authority of Los Angeles, 782 F.2d 829, 832 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

The district court ruled that either the report was an opinion that was not rendered until after trial, and hence was not newly discovered evidence, or the report contained factual evidence that the plaintiffs could have obtained before trial, if they had exercised due diligence. On either grounds, the evidence should not be allowed to disturb the judgement and the denial of the motion was not an abuse of discretion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MYRON E. MILES AND DOROTHY L. MILES, PLAINTIFFS, VERSUS, CLAYTON YEUTTER, SECRETARY OF AGRICULTURE; THE UNITED STATES DEPARTMENT OF AGRICULTURE; NEIL SOX JOHNSON, ADMINISTRATOR OF THE FARMERS HOME ADMINISTRATION; AND THE FARMERS HOME ADMINISTRATION, DEFENDANTS.	CV. NO. 89-1348 APRIL 23, 1990 PORTLAND, OREGON

BEFORE: THE HONORABLE OWEN M. PANNER,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL

FOR THE PLAINTIFFS: TODD S. WELCH
KAREN A. KISHBAUGH
SCOTT W. HORNGREN

FOR THE DEFENDANTS: WILLIAM YOUNGMAN
JOHN MUNSON

REPORTED BY: LIZ MEACHAM
225 U.S. COURTHOUSE
PORTLAND, OREGON 97205
(503) 326-3113

[p. 2] PROCEEDINGS

THE CLERK: THIS IS CIVIL 89-1348, MYRON E. MILES VERSUS YEUTTER.

THE COURT: I HAVE RECEIVED TODAY A MEMO FROM BOTH OF YOU SETTING FORTH THE CROSS-EXAMINATION THAT YOU WISH WITH RESPECT TO THE OTHER'S WITNESSES. IT'S OBVIOUS THAT THAT IS EXTENSIVE AND THAT ON A FAST TRACK SCHEDULE TRYING TO DO IT ON A MOTION DAY, IT'S NOT POSSIBLE TO DO THAT.

I HAVE ALSO HAD THE BENEFIT OF YOUR VERY ABLE BRIEFING, AND I'M PREPARED TO GIVE YOU SOME RULINGS. AND THEN WHAT I'M GOING TO ASK YOU TO DO IN ORDER TO KEEP IT ON A FAST TRACK SCHEDULE, BECAUSE THE CALENDAR IS SO HEAVY, I'M GOING TO ASK YOU TO DO THAT CROSS-EXAMINATION BY DEPOSITION AND SUBMIT THAT TO ME FOR REVIEW.

YOU CAN GET A REPORTER TO TRANSCRIBE THAT, AND YOU CAN FINISH THAT UP TODAY, TOMORROW, OR WHENEVER YOU WANT TO. YOU CAN BE THINKING ABOUT THE TIMETABLE ON THAT AS TO HOW LONG YOU WANT TO COME BACK TO ME WITH THAT. BUT MY RULINGS ARE GOING TO LIMIT SOME OF THAT, NOT ALL OF IT, AS I'VE CONCLUDED.

I'M SATISFIED THAT THE MOTION TO DISMISS SHOULD BE GRANTED AS TO THE FIRST, THIRD, AND FOURTH [p. 3] CLAIMS AND THE 16TH CLAIM,

TO THE EXTENT THAT THEY ARE BASED ON CONTRACT THEORY. I'M GOING TO FOLLOW THAT UP WITH AN OPINION EXPLAINING THAT IN MORE DETAIL.

AS FAR AS THE FIFTH, SIXTH, AND SEVENTH CLAIMS, I'M SATISFIED THAT THE REMEDY FOR ANY ALLEGED VIOLATION IS NOT TO SET ASIDE THE EASEMENT BUT AT THE MOST A RECISION OR AN ACTION FOR DAMAGES, SO I'M GOING TO GRANT THAT MOTION TO DISMISS.

I'M GOING TO GRANT THE MOTION TO DISMISS AS TO THE SECOND AND THE EIGHTH CLAIMS.

I'M GOING TO DENY THE MOTION TO DISMISS AS TO THE NINTH, TENTH, 11TH, 12TH, 13TH, 14TH AND 15TH CLAIMS AND TO THE 16TH CLAIM, TO THE EXTENT THAT THOSE ARE BASED ON THE ADMINISTRATIVE PRACTICES ACT.

IN OTHER WORDS, THE QUESTION THEN BECOMES RELEVANT AS TO WHETHER THE ADMINISTRATIVE AGENCY ACTED PROPERLY OR NOT.

THOSE ARE MY RULINGS. I THINK THOSE WILL SIMPLIFY THE ISSUES SOMEWHAT.

I NEED TO KNOW HOW LONG YOU WANT TO TAKE THE TESTIMONY OF THESE WITNESSES? DO YOU WANT TO START THAT THIS AFTERNOON? CAN YOU DO THAT NOW?

MR. YOUNGMAN: WE CAN DO THAT NOW, YOUR HONOR.

THE COURT: I DON'T KNOW IF THERE'S A [p. 4] COURT REPORTER AVAILABLE.

DO YOU KNOW, LIZ?

WE'LL TRY TO MAKE ONE AVAILABLE.

MR. WELCH: YOUR HONOR, I'M TODD WELCH, WITH MOUNTAIN STATES LEGAL FOUNDATION, AND HAVE NOT APPEARED BEFORE THE COURT BEFORE TODAY. THE ONE REQUEST I MIGHT MAKE IS IF WE'RE UNABLE TO FIND A REPORTER, COULD WE DO THIS BY TELEPHONE IF THE DEFENDANTS WOULD AGREE?

THE COURT: I THINK SO. I DON'T SEE –

MR. YOUNGMAN: WE AGREE.

THE COURT: I DON'T SEE ANY REASON NOT TO DO IT. NO, THAT'S FINE.

MR. WELCH: IT MIGHT BE NECESSARY FOR US TO SIT DOWN AND DISCUSS EXACTLY WHICH AREAS WE NEED TO CROSS-EXAMINE ON BASED ON THE RULINGS. THEREFORE, IT'S DIFFICULT FOR US TO SAY, OR AT LEAST FOR ME TO SAY AT THIS POINT THAT WE COULD FINISH THE DEPOSITIONS TODAY OR TOMORROW.

THE COURT: I DON'T REALLY EXPECT YOU TO DO THAT. WHAT IF I GAVE YOU TEN DAYS TO FINISH THE DEPOSITIONS, PROBABLY 15 DAYS TO GET THEM REPORTED AND BACK TO ME. IS THAT REASONABLE?

MR. WELCH: AS FAR AS I KNOW, WE WOULDN'T HAVE ANY PROBLEM IN TAKING THOSE

DEPOSITIONS WITHIN TEN [p. 5] DAYS, YOUR HONOR. I DON'T KNOW WHAT THE WITNESSES' SCHEDULES ARE, AND THAT MIGHT BE A –

THE COURT: WELL, YOU'LL HAVE TO WORK THAT OUT. YOU PROBABLY SHOULD TRY TO DO THE DEPOSITIONS OF THE WITNESSES THAT ARE HERE THIS AFTERNOON WHILE THEY'RE HERE.

MR. YOUNGMAN.

MR. YOUNGMAN: AT LEAST MR. CLONTS, IF THAT WOULD BE POSSIBLE, BECAUSE HE IS GOING BACK TO BAKER, YOUR HONOR. ALTHOUGH, I SUPPOSE WE COULD GET A THREE-WAY TELEPHONE CONFERENCE.

THE COURT: WELL, IT'S – IF YOU CAN FIGURE OUT HOW TO DO IT THIS AFTERNOON, FOR THE CONVENIENCE OF THESE WITNESSES, AS BUSY AS EVERYONE IS, IT WOULD BE BEST TO DO IT.

SO I WOULD URGE YOU TO SIT DOWN NOW IMMEDIATELY, IN THE LIGHT OF THOSE RULINGS, AND TRY TO SEE WHERE YOU ARE AND PLAN YOUR QUESTIONS SO THAT YOU CAN SHORTEN THEM UP AS MUCH AS POSSIBLE. ALL RIGHT.

MR. YOUNGMAN: WE'LL DO THAT, YOUR HONOR.

MR. WELCH: YES, SIR.

THE COURT: I'LL LEAVE OPEN THE QUESTION – I'LL ASK YOU TO INFORM ME, AFTER YOU'VE FINISHED THIS AFTERNOON, HOW LONG YOU THINK IT'S GOING TO TAKE YOU TO DO IT AFTER

YOU'VE HAD A CHANCE TO STUDY [p. 6] IT. AND THEN WE'LL SET A DATE.

WHAT I'D LIKE TO DO IS SET A DATE FOR BRIEFING AND ARGUMENTS AFTER THE DEPOSITIONS HAVE COME IN, AFTER YOU'VE GOT THEM, AND I WOULD BE THINKING IN TERMS OF 30 TO 45 DAYS ON THAT IF YOU CAN DO THAT.

MR. YOUNGMAN: THE ONLY PROBLEM THAT CREATES FOR ME, YOUR HONOR, IS THE DISCUSSION THAT WE HAD LAST TIME WE WERE HERE ABOUT A QUICK RULING IN ORDER TO GET THE EASEMENT IN PLACE AND PROTECT THE –

THE COURT: I AM CONCERNED ABOUT THAT, AND I'M WILLING TO DO ANYTHING – I'M WILLING TO SPEED IT UP AS MUCH AS YOU WANT TO. I'LL DO IT – WE CAN SET THE ARGUMENTS AS QUICK AS YOU WANT TO DO IT.

SO ALL I NEED IS I'LL NEED TO READ THE DEPOSITIONS, AND YOU'LL NEED TO HAVE A COURT REPORTER GET THOSE OUT FOR YOU AS QUICKLY AS POSSIBLE. AND THEN I'D BE PREPARED TO HEAR ARGUMENTS OR WHATEVER.

MR. YOUNGMAN: THAT'S FINE, YOUR HONOR.

THE COURT: LET'S DO IT THIS WAY. YOU GO AHEAD AND TALK, AND I'LL SEE COUNSEL AFTER YOU FINISH THIS AFTERNOON AS SOON AS – I THINK I HAVE ANOTHER MATTER AT 2:30 AND ONE AT 3:00, IRIS, OR SOMETHING.

THE CLERK: ONE AT 2:45 AND ONE AT 3:00.

THE COURT: ONE AT 2:45 AND ONE AT 3:00. THE ONE AT 3:00 IS A FINAL ARGUMENT, SO IT WILL PROBABLY [p. 7] TAKE AN HOUR. I CAN SEE YOU PROBABLY AT 4 O'CLOCK.

MR. YOUNGMAN: FINE.

THE COURT: IS THAT ALL RIGHT? AND WE'LL EXPEDITE IT AS BEST WE CAN.

MR. WELCH: YOUR HONOR, I HAVE ONE OTHER QUESTION. I APOLOGIZE.

THE COURT: ALL RIGHT.

MR. WELCH: WE FILED A MOTION ON FRIDAY, REQUESTING THE OPPORTUNITY TO HAVE A REBUTTAL WITNESS, DR. GATES, TESTIFY IN THIS MATTER. AND WE – IF IT'S GOING TO BE NECESSARY – IF THE COURT WILL ALLOW HIS TESTIMONY, THEN I'M SURE THAT THE DEFENDANTS WILL WANT TO CROSS-EXAMINE HIM AND THAT AFFECTS WHAT WE DO AND WOULD –

THE COURT: WELL, I WILL ALLOW IT IF IT'S PROPER REBUTTAL. I HAVEN'T HAD A CHANCE TO STUDY THAT, I MUST SAY.

DO YOU HAVE ANY OBJECTION TO IT?

MR. YOUNGMAN: WE DO HAVE AN OBJECTION TO THE FORM.

THE COURT: TELL ME ABOUT IT.

MR. YOUNGMAN: I HAVE AN OBJECTION TO THE FORM THE STATEMENT'S IN, YOUR HONOR.

YOU SET THE 13TH OF APRIL AS THE DAY WITNESS STATEMENTS WERE TO BE DELIVERED BY BOTH SIDES, AND ONE OF THE REASONS I ASSUME [p. 8] WE DID THAT IS SO ONE SIDE WOULDN'T BE ABLE TO LIE IN THE WEEDS AND TAKE SHOTS AT THE OTHER SIDE'S WITNESSES. THIS IS NOT A PROPOSED WITNESS STATEMENT. IT'S SIMPLY A CROSS-EXAMINATION AND REBUTTAL OF OUR EXPERT. AND I THINK THAT IN THAT SENSE IT'S FAIRLY DISTINCTLY UNFAIR AT THIS STAGE IN THE GAME.

THE COURT: LET ME JUST LOOK AT IT HERE.

MR. YOUNGMAN: IT TAKES OUR WITNESS'S STATEMENT APART, LINE BY LINE.

THE COURT: WELL, WE CAN GO ON FOREVER ON THAT BASIS, SO I'LL SUSTAIN THE OBJECTION. RATHER THAN A REBUTTAL WITNESS, IF YOU – IT SEEMS TO ME THAT EVERYBODY AGREED, IN ORDER TO EXPEDITE THIS, THAT ALL THE STATEMENTS WOULD BE PRESENTED.

MR. WELCH: YOUR HONOR, EXCUSE ME. THE ONE PROBLEM THAT WE HAD WITH THAT, BEING THE PLAINTIFF IN THIS CASE IN THE CASE, THIS IDEA OF THIS PLANT HAS COME UP VERY LATE IN THE MATTER. THE FIRST TIME THAT WE HAD ANY IDEA THAT THERE WAS ANY DISCUSSION ABOUT A PLANT WAS IN THE MIDDLE OF MARCH WHEN WE CAME IN FOR THE ARGUMENT ON THE PRELIMINARY INJUNCTION.

WE BEGAN AT THAT TIME SEARCHING FOR AN EXPERT THAT COULD GIVE US INFORMATION THAT WOULD BE HELPFUL TO THE COURT IN DECIDING THE STATUS OF THIS PARTICULAR PLANT, AND WE'RE JUST ABLE TO BE ABLE TO GET HIM. NOW, [p. 9] UNDER A NORMAL TRIAL SITUATION WE WOULD HAVE DEPOSED THE EXPERT AND WOULD HAVE HAD INFORMATION THAT COMES OUT IN THE STATEMENT, WOULD HAVE HAD AN OPPORTUNITY TO ALLOW OUR EXPERT TO REVIEW IT.

IT FLIP-FLOPS THE SITUATION NORMALLY, BECAUSE THE PLAINTIFF WOULD CARRY THE BURDEN OF PROOF. BUT WHEN THEY'RE RAISING WHAT, IN ESSENCE, IS AN AFFIRMATIVE DEFENSE, ALTHOUGH IT'S NOT STATED AT ALL IN THEIR ANSWER ABOUT THE MEDIUM TO PROTECT THE PLANT, THEN THEY CARRY THE BURDEN OF PROVING THAT. AND THE ONLY THING BEFORE THE COURT IS THIS STATEMENT BY MR. KAGAN, AND WE DON'T HAVE AN OPPORTUNITY TO PRESENT ANYTHING TO THE COURT IN REBUTTAL OF THAT.

AND THAT'S THE PURPOSE OF WHAT WE'RE TRYING TO DO.

THE COURT: LET ME LOOK AT THIS AGAIN NOW, AND I'LL TELL YOU AT 4 O'CLOCK.

MR. WELCH: THANK YOU, YOUR HONOR.

THE COURT: WE'LL BE IN RECESS.

(RECESS)

[p. 10] THE COURT: OKAY. THIS IS A CONTINUED HEARING IN CONNECTION WITH THIS

MATTER. AND QUESTION HAS BEEN RAISED, APPARENTLY BY COUNSEL, AS TO WHAT ISSUES ARE LEFT IN THE CASE. AND MAYBE I SHOULD GET YOUR IDEAS, FIRST FOR THE PLAINTIFF, ABOUT WHAT ISSUE YOU THINK IS LEFT IN THE CASE AND WHAT FACTUAL ISSUES, IF ANY, THERE ARE.

MR. WELCH: YOUR HONOR, IN REVIEWING THE ORDER OF THE COURT MADE IN OPEN COURT REGARDING THE CLAIMS IN THE AMENDED COMPLAINT; IT APPEARS THAT THERE ARE THREE ISSUES THAT ARE REMAINING IN THE CASE.

THE FIRST ISSUE DEALS WITH THE DELINEATION OF THE WETLANDS. AND I THINK THAT'S A SECONDARY ISSUE TO THE QUESTION OF WHETHER OR NOT THEY HAVE THE AUTHORITY, UNDER THE FOOD SECURITY ACT, UNDER THE EXECUTIVE ORDER, OR UNDER THEIR OWN REGULATIONS TO IMPOSE THE EASEMENT AS THEY HAVE.

SO I GUESS THE FIRST ISSUE WOULD BE THE ISSUE OF THE ADMINISTRATIVE PROCEDURES ACT, WHETHER OR NOT THEY'VE ACTED ARBITRARY AND CAPRICIOUS, AND CONTRARY TO LAW, IN IMPOSING THE – IN ATTEMPTING TO IMPOSE THE EASEMENT ON THE PROPERTY.

IF THEY HAVE NOT, IF THERE IS – IF IT'S PROPER LEGALLY FOR THEM TO IMPOSE THE EASEMENT AS THEY HAVE, THEN THE QUESTION ARISES AS TO WHETHER OR NOT IT'S [p. 11] BEEN DELINEATED PROPERLY, SCIENTIFICALLY, WHETHER OR NOT THEY'VE GONE THROUGH THE STEPS NECESSARY

TO PROPERLY DEFINE THE WETLANDS AREA AND SET IF OFF IN THE EASEMENT.

AND THEN THE THIRD ISSUE, IF I UNDERSTAND THE RULING OF THE COURT PROPERLY, IS THE QUESTION ABOUT DAMAGES, THE QUESTION ABOUT TAKING UNDER THE 5TH AMENDMENT AND THE DAMAGES THAT THAT RAISES.

NOW, IT SEEMS TO ME THAT THE APA ISSUE IS STRICTLY A LEGAL ISSUE. I THINK THAT THERE'S ENOUGH FACTUAL INFORMATION BEFORE THE COURT ON THE APA TO SHOW THAT THEIR ACTIONS WERE ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW. AND THAT'S ARGUMENT, OBVIOUSLY, BUT THAT'S OUR POSITION. BUT THAT'S A LEGAL QUESTION.

THE COURT: BUT IT IS YOUR POSITION THAT NO OTHER EVIDENCE IS REQUIRED TO ANSWER THAT FIRST QUESTION: IS THERE AUTHORITY UNDER THE STATUTES TO IMPOSE THE EASEMENT?

MR. WELCH: I DON'T THINK THAT THERE'S ANY – I THINK WE'VE BEAT THAT ISSUE TO DEATH. YOUR HONOR.

THE COURT: ALL RIGHT.

MR. YOUNGMAN: WE AGREE WITH THAT. TAKE ISSUE OBVIOUSLY WITH HIS CONCLUSION, BUT THE ISSUE'S A LEGAL ONE.

THE COURT: OKAY.

[p. 12] THE COURT: ALL RIGHT. IN ADDITION TO WHAT I'VE DECIDED, THEN, DO YOU WANT ME TO DECIDE THAT ISSUE FIRST?

OBVIOUSLY, IF I DECIDE YES, THERE IS AUTHORITY, THEN WE HAVE TO, ACCORDING TO YOUR THEORY, DETERMINE WHETHER THERE'S A PROPER DELINEATION OF THE WETLANDS, IS THAT RIGHT?

MR. WELCH: YES, SIR.

THE COURT: AND UNDER – UNDER YOUR POSITION, IF I DECIDE THAT THERE IS NOT AUTHORITY, THEN QUESTION TWO WOULDN'T BE SIGNIFICANT, WOULD IT?

MR. YOUNGMAN: NO.

MR. WELCH: I THINK THAT'S PROPER.

THE COURT: SO DO YOU WANT TO BIFURCATE THIS QUESTION AND HAVE ME TAKE THE RECORD NOW AS IT IS AND MAKE A DECISION ON THAT QUESTION NUMBER ONE, IN ADDITION TO WHAT I HAVE? IS THAT WHAT YOU'D LIKE TO HAVE DONE?

MR. YOUNGMAN: FINE WITH US.

MR. WELCH: IT SEEMS TO ME, YOUR HONOR, THAT THAT'S THE WHOLE CRUX OF THE CASE. EITHER THEY HAVE AUTHORITY TO DO IT, OR THEY DON'T HAVE AUTHORITY TO DO IT. AND IF YOU WERE TO DECIDE THAT, THEN THAT DOES AWAY WITH A LOT OF OTHER ISSUES IN THE CASE, AND IT – EXPRESSING FOR THE MILES', I THINK IT WOULD FORCE THEM [p. 13] TO HAVE TO MAKE A

DECISION AS TO WHAT THEY WERE GOING TO DO AS FAR AS PROCEEDING WITH OTHER MATTERS. I THINK THAT'S –

THE COURT: AND EVERYBODY NEEDS TO KNOW PROMPTLY WHAT'S GOING TO HAPPEN. AND SO I WILL TRY TO DECIDE THAT FIRST ISSUE VERY PROMPTLY, AND THEN WE'LL SEE WHERE WE GO FROM THERE.

MR. WELCH: IS THERE ANYTHING THAT YOU FEEL WOULD BE NECESSARY FROM US? IF YOU WOULD LIKE SOMETHING VERY SHORT AND BRIEF ABOUT OUR POSITION ON THE FOOD SECURITY ACT, THE EXECUTIVE ORDER AND THE REGULATIONS AND WHY WE FEEL THOSE ARE ARBITRARY AND CAPRICIOUS.

THE COURT: HAVEN'T YOU ALREADY GIVEN US THAT?

MR. WELCH: WELL, YES, BUT IT'S INTERSPERSED WITH A LOT OF OTHER THINGS, AND WE WOULD CONDENSE IT AND PROVIDE IT TO YOU IF IT WOULD BE HELPFUL TO THE COURT.

THE COURT: CAN YOU DO THAT IN THE NEXT 24 HOURS, 48 HOURS?

MR. WELCH: IT WOULD BE A LITTLE TOUGH TO GET IT UP HERE, BUT I THINK WE PROBABLY COULD. ONE OF THE PROBLEMS, WE WON'T BE BACK IN THE OFFICE.

THE COURT: YOU CAN FAX IT TO ME.

[p. 14] MR. WELCH: WE WON'T BE BACK IN THE OFFICE UNTIL WEDNESDAY MORNING.

THE COURT: WE'LL SORT IT OUT. I THINK WE CAN SORT IT OUT.

MR. WELCH: I'M ONLY OFFERING TO HELP, YOUR HONOR.

THE COURT: OKAY.

MR. YOUNGMAN: WE'VE BRIEFED IT THOROUGHLY. DOES THAT MAKE THE FACTUAL DEPOSITIONS FAIRLY MOOT AT THIS POINT?

THE COURT: YES. THE ONLY POSSIBLE ARGUMENT ON THE DEPOSITIONS WOULD BE IF I DECIDED THAT THERE WAS AUTHORITY UNDER THE ACTS TO IMPOSE THE EASEMENT. THEN I UNDERSTAND THE PLAINTIFF IS STILL ARGUING ABOUT WHETHER THEY HAVE DEFINED IT PROPERLY, IS THAT RIGHT?

MR. WELCH: (NODDING HEAD).

THE COURT: SO MY FEELING WOULD BE THAT YOU PROBABLY WANT TO GO AHEAD AND TAKE THESE DEPOSITIONS TO DETERMINE WHETHER THEY – IF YOU THINK THERE ARE FACTUAL ISSUES IN THAT AREA AS TO WHETHER THEY'VE IMPOSED THE BOUNDARIES PROPERLY, SO THAT WE DON'T WASTE ANY MORE TIME.

MR. YOUNGMAN: SPEAKING FOR OUR – FOR THE DEFENDANTS, WE PROBABLY WILL HAVE NO NEED TO DEPOSE [p. 15] MR. MILES ON THAT

QUESTION, BECAUSE HE DOESN'T HAVE ANY EXPERTISE PROBABLY TO ADD TO IT, I DON'T THINK.

THE COURT: WHICH ONE IS HE NOW?

MR. YOUNGMAN: HE'S THE PLAINTIFF, YOUR HONOR.

THE COURT: HE'S THE PLAINTIFF'S REBUTTAL EXPERT?

MR. YOUNGMAN: NO. NO. HE'S THE PLAINTIFF HIMSELF, THE FARMER, THE RANCHER.

THE COURT: OKAY. BUT YOU STILL WANT TO DEPOSE ALL OF THEIR EXPERTS ON THAT QUESTION?

MR. WELCH: (NODDING HEAD).

THE COURT: WELL, I WOULD SUGGEST YOU GET AT IT, BECAUSE WE DON'T WANT TO DELAY THIS. WE'VE MADE A COMMITMENT TO GET THIS RESOLVED QUICKLY, AND SO I SUGGEST YOU GET AT IT.

IF I DECIDE THERE'S NO AUTHORITY, THEN IT'S NOT GOING TO MATTER. BUT IF I DECIDE THERE IS AUTHORITY – AND EVEN IF I DECIDE THERE'S NO AUTHORITY, I WOULD ANTICIPATE IT'S STILL GOING TO GO TO THE CIRCUIT PROBABLY.

YOU KNOW, IT'S AN INTERESTING QUESTION AND SO YOU MIGHT AS WELL PUT IT ALL TOGETHER FOR ME WHILE I'M MAKING THAT DECISION, AND LET'S TRY TO GET IT DONE IN ONE STAGE.

[p. 16] MR. WELCH: NOW, MR. GATES IS A SOILS EXPERT, AND ALTHOUGH HE'S – DISCUSSES MOSTLY IN HIS WITNESS STATEMENT – HE DOES DISCUSS MOSTLY ABOUT THE PLANT, THERE'S STILL SOME QUESTIONS RAISED IN THERE ABOUT WETLANDS, AND I DON'T KNOW – IT MAY DEPEND WHETHER THEY WANT TO CROSS-EXAMINE HIM FOR PURPOSES FOR THE COURT. THAT'S A QUESTION ON THE OTHER RULING, YOUR HONOR, AND I –

THE COURT: WELL, I'M WILLING. I THINK, TO MAKE THE RECORD COMPLETE, WE BETTER LET HIM – AS LONG AS WE'RE GOING TO BE TAKING DEPOSITIONS, YOU BETTER LET HIM TESTIFY, AND YOU BETTER CROSS-EXAMINE HIM, IF YOU WANT TO, ON THAT SUBJECT.

MR. YOUNGMAN: OKAY.

THE COURT: IF YOU THINK IT FITS INTO THIS CASE. I MUST SAY I HAVE RESERVATIONS ABOUT IT. IF THEY HAVE AUTHORITY TO IMPOSE IT, THEN ISN'T IT TO BE PRETTY WELL DECIDED BASED ON THE ADMINISTRATIVE RECORD?

MR. WELCH: THE AUTHORITY TO – YOU MEAN THE DELINEATION OF THE EASEMENT?

THE COURT: YES, THE DELINEATION.

MR. WELCH: WELL, I GUESS THE REASON THAT WE WOULD DISPUTE THAT IS WE DON'T KNOW IF THEY'VE USED THE PROPER EXPERTISE AND USED THE PROPER METHODS, AND THAT'S ALL CROSS-EXAMINATION WOULD BE, YOUR HONOR.

[p. 17] MS. KISHBAUGH: ARE YOU SAYING THAT IF THIS PARTICULAR PLANT IS NOT IN THE ADMINISTRATIVE RECORD THAT IT CANNOT COME IN?

THE COURT: WELL, THAT'S MY FEELING. WHAT I'M DOING HERE, I THINK IS REVIEWING THE ADMINISTRATIVE RECORD.

MS. KISHBAUGH: UH-HUH.

THE COURT: BOTH WITH RESPECT TO THEIR AUTHORITY TO IMPOSE THE EASEMENT AND, SECOND, THE EXTENT OF THE EASEMENT. I ASSUME ALL THAT WAS COVERED IN THE ADMINISTRATIVE RECORD, WASN'T IT?

MS. KISHBAUGH: WELL, YES.

THE COURT: ISN'T THAT WHAT WE'RE DECIDING? I CAN'T START OVER. THIS IS AN ADMINISTRATIVE RECORD REVIEW, ISN'T IT? SOMEBODY SAY SOMETHING.

MR. MUNSON: I THINK THAT'S RIGHT, YES.

MR. YOUNGMAN: BY THE WAY, YOUR HONOR, THIS IS JOHN MUNSON, WHO IS AN ASSISTANT U. S. ATTORNEY WITH REGIONAL COUNSEL OF AGRICULTURE, WHO'S FOLLOWED THIS THING ALL THE WAY ALONG.

THE COURT: IF ANYBODY HAS ANY QUESTION ABOUT THAT, THEY BETTER BRIEF THAT FOR ME PRETTY QUICK, BECAUSE THAT'S MY FEELING.

AND IF THAT'S SO, THEN I THINK THE FIRST STEP [p. 18] IS TO DECIDE WHETHER THERE'S AN

ABUSE OF DISCRETION IN THAT ADMINISTRATIVE PROCEDURE.

MR. WELCH: WELL, AND I'D GUESS, YOUR HONOR, IN RAISING THAT QUESTION, WE WOULD QUESTION WHETHER OR NOT THEY'VE ABUSED THEIR DISCRETION IN THAT. WE DON'T – MY CONCERN IS THAT PROPER EXPERTISE WASN'T USED TO DELINEATE THAT. DR. GATES TELLS ME THAT A SOILS EXPERT SHOULD HAVE LOOKED AT IT. AND IT DOESN'T LOOK LIKE ANYBODY WHO WENT OUT AND LOOKED AT THE PROPERTY HAD SOIL EXPERTISE.

THE COURT: LET'S SUPPOSE THEY SHOULD HAVE, THOUGH. MY DECISION STILL HAS TO BE BASED ON A REVIEW OF THE ADMINISTRATIVE RECORD, DOESN'T IT? IN OTHER WORDS, IF IT SHOWS AFFIRMATIVELY FROM THE ADMINISTRATIVE RECORD THAT THEY ABUSED THEIR DISCRETION –

MR. WELCH: YES, SIR.

THE COURT: – THAT'S THE ISSUE FIRST?

MR. WELCH: YES, SIR.

THE COURT: IF THEY DID, THEN I SHOULD SEND IT BACK TO THEM TO RECONSIDER IT AND TELL THEM HOW TO DO IT IF I ASSUME THEY HAVE AUTHORITY TO DO IT. IF I FIND THEY HAVE AUTHORITY TO DO THAT IF I DON'T FIND THEY ABUSED THEIR DISCRETION, THEN IT REALLY DOESN'T MATTER WHAT THESE OTHER WITNESSES SAY, DOES IT?

[p. 19] MR. WELCH: THAT'S RIGHT.

THE COURT: SO I'M NOT SURE THERE IS ANY NEED FOR ANY FURTHER TESTIMONY. I THINK I HAVE TO LOOK AT THAT ADMINISTRATIVE RECORD BY THE FOUR CORNERS AND DECIDE FIRST WHETHER THERE'S AN ABUSE OF DISCRETION. AND THAT RECORD, I UNDERSTAND, DOES NOT CONTAIN THIS PARTICULAR PLANT THAT YOU SAY WAS BROUGHT UP AT THE LAST MINUTE?

MR. HORNGREN: THE ONLY THING IN THIS PARTICULAR CASE, UNLIKE SOME OF THE OTHER CASES WHERE THE FEDERAL AGENCIES - WHERE YOU HAVE AN ADMINISTRATIVE LAW JUDGE OR AN ADMINISTRATIVE APPEAL PROCESS WHERE THE PERSON IS AGGRIEVED, AND THEY PUT TOGETHER A RECORD. THERE WAS NO SUCH PROCESS HERE.

BUT YOU'RE CORRECT. THE PLANT REALLY WASN'T AN ISSUE EARLY ON IN JUST SOME OF THE INFORMAL CORRESPONDENCE GOING BACK AND FORTH BETWEEN THE PARTIES WHICH IS PART OF THE EXHIBITS.

MS. KISHBAUGH: THERE WAS ONE LETTER THAT THE PLAINTIFFS ASKED FOR A REVIEW AND FMHA SET OUT THEIR REASONS AND SAID THIS IS A FINAL DECISION AND HERE'S WHY. ALTHOUGH WE DON'T NEED TO DO THIS, HERE'S WHY.

SO I THINK THAT'S ALL WE HAVE. THERE WAS NO FORMAL HEARING, NO FORMAL TRIAL TYPE PROCEDURE.

MR. WELCH: I DON'T KNOW WHAT YOU'D [p. 20] DEFINE AS THE RECORD EITHER, YOUR HONOR. I MEAN, IF YOU'RE TALKING ABOUT THIS STATEMENT FROM MR. KAGAN, FOR EXAMPLE, WHO IS THE EXPERT WHO TESTIFIES ABOUT THE PLANT, IS PART OF THE RECORD, THEN IT'S PART OF THE RECORD.

AND THAT'S THE REASON FOR DR. GATES. I MEAN, THAT WAS MY CONCERN.

THE COURT: YOU MEAN THE STATEMENT THAT HE FILED IN THIS COURT?

MR. WELCH: YES, SIR.

THE COURT: THAT'S CERTAINLY NOT PART OF THE ADMINISTRATIVE RECORD, IS IT?

MR. WELCH: WELL, I WOULDN'T THINK IT WOULD BE.

THE COURT: MR. YOUNGMAN.

MR. YOUNGMAN: I WOULD AGREE THAT IT'S NOT, YOUR HONOR. HOWEVER, THERE IS A STATEMENT FROM HIM ON THE SAME SUBJECT THAT IS AN EARLIER STATEMENT THAT IS PART OF THE RECORD.

BUT, NO I WOULDN'T MAKE A CLAIM THAT HIS STATEMENT IN PREPARATION FOR TRIAL IS PART OF THE RECORD.

THE COURT: CAN YOU AGREE ON WHAT THE ADMINISTRATIVE RECORD IS? MAYBE THAT'S WHERE WE OUGHT TO START.

[p. 21] MR. YOUNGMAN: I THINK WE CAN DO THAT. WOULDN'T THAT BE THE FILE UP TO THE POINT WHERE WE STARTED PREPARING FOR TRIAL, PREPARING THE WITNESS STATEMENTS?

MR. HORNGREN: NEITHER PARTY HAD ANY OBJECTIONS TO THE OTHER'S EXHIBITS, AS I RECALL.

MR. YOUNGMAN: IT'S THE EXHIBITS, YEAH. AND I DON'T SEE A PROBLEM WITH THAT.

THE COURT: WELL, LET'S HAVE A STIPULATION, THEN, THAT THE ADMINISTRATIVE RECORD CONSISTS OF THE EXHIBITS THAT HAVE BEEN FILED IN THIS COURT BUT NOT THE WITNESS STATEMENTS THAT HAVE BEEN FILED IN THIS COURT, IS THAT RIGHT?

MR. YOUNGMAN: THAT'S FINE FOR THE DEFENDANTS, YOUR HONOR, YES.

THE COURT: DO YOU AGREE?

MR. WELCH: WELL – AND I HATE TO BE THE STOPPER IN THIS, YOUR HONOR, BUT PART OF THE PROBLEM IS THAT YOU HAVE THESE LETTERS THAT COME IN – KAGAN, FOR EXAMPLE, WRITES A LETTER TO FMHA AND SAYS, THIS PLANT EXISTS THERE.

NOW, THERE'S NO – THERE'S NOTHING THAT COMES OUT OF FMHA AS FAR AS THE DECISION PROCESS IS CONCERNED, THAT INVOLVES THAT PARTICULAR PLANT. IT'S JUST – THERE'S JUST A LETTER IN THERE. I MEAN, THERE'S NOTHING [p. 22] THAT COMES OUT.

THE COURT: ISN'T THAT SOMETHING YOU CAN ARGUE ABOUT? EITHER YOU – I DON'T KNOW WHAT YOU ARE GOING TO DO ABOUT THAT. THE – WHATEVER THE ADMINISTRATION – THE ADMINISTRATIVE ORGANIZATION CONSIDERED IS PROBABLY PART OF THE ADMINISTRATIVE RECORD.

YOU CAN ARGUE ABOUT WHETHER THEY SHOULD HAVE CONSIDERED IT AND SO FORTH.

MR. WELCH: YES.

THE COURT: BUT EVERYTHING YOU'RE REFERRING TO IS AN EXHIBIT IN THE CASE, I GATHER, IS THAT RIGHT?

MR. WELCH: YES, SIR.

THE COURT: AND WAS DONE BEFORE THE COURT HEARING STARTED?

MS. KISHBAUGH: YES.

MR. YOUNGMAN: YES.

MR. WELCH: YES, SIR.

THE COURT: OKAY, WELL, THEN I'M GOING TO TREAT – UNLESS THERE'S SOME OBJECTION TO IT, I WILL TREAT ALL EXHIBITS FILED BY BOTH PARTIES AS THE ADMINISTRATIVE RECORD, BUT I WILL NOT CONSIDER THE WITNESS STATEMENTS THAT I DIRECTED BE FILED IN THE CASE. OKAY.

[p. 23] SEE, WHEN I DIRECTED THE FILING OF THOSE WITNESS STATEMENTS, I WASN'T SURE THERE WOULD BE ANY OR ANY NECESSITY FOR THEM. I HADN'T HAD THAT MUCH KNOWLEDGE

ABOUT THE SUBJECT, SO I DEPENDED ON COUNSEL TO TELL ME, AND I GUESS I PROBABLY SHOULDN'T HAVE DONE THAT. YOU PROBABLY SHOULD HAVE TOLD ME RIGHT OFF, WE DON'T NEED ANY WITNESS STATEMENTS.

THIS IS AN ADMINISTRATIVE RECORD, AND IT'S A QUESTION OF WHETHER THEY ABUSED THEIR DISCRETION IN THAT. OKAY.

ALL RIGHT. WELL, THEN, YOU DON'T NEED TO TAKE ANY DEPOSITIONS. THE WHOLE THING IS SUBMITTED TO ME NOW. AND I WILL DECIDE BOTH THE QUESTIONS THAT YOU HAVE POSED TO ME BASED ON THE ADMINISTRATIVE RECORD.

THE QUESTION IS, FIRST, IS THERE AUTHORITY UNDER THE STATUTES AND REGULATIONS TO IMPOSE THE EASEMENT AT ALL? AND SECOND, IS THERE A SUFFICIENT BASIS FOR THE DELINEATION OF THE WETLANDS? RIGHT?

OKAY. THANK YOU.

* * *

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE ORAL PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER.

DATED September 13, 1990

/s/ Liz Keacham